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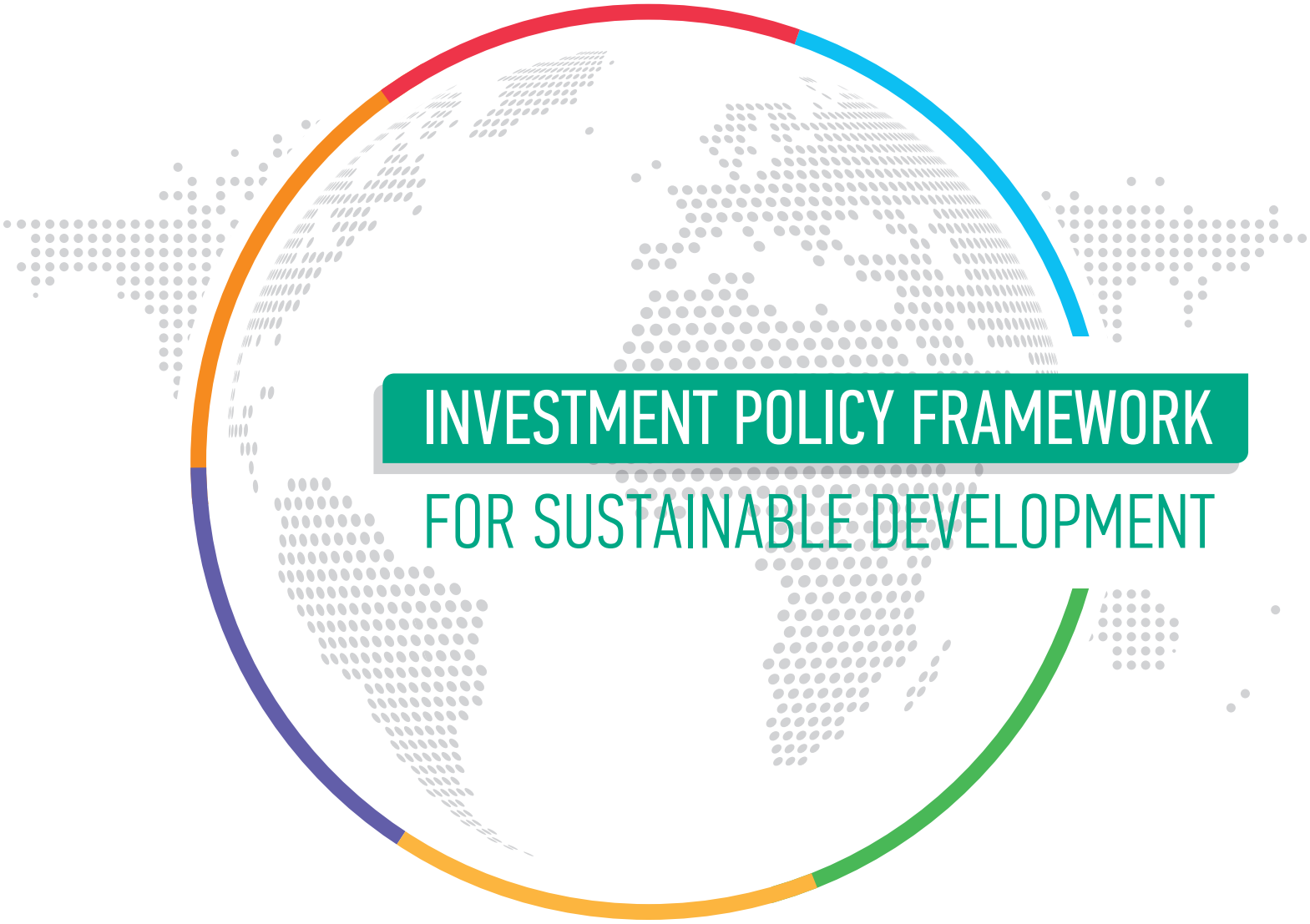

INVESTMENT POLICY FRAMEWORK

FOR SUSTAINABLE DEVELOPMENT

- NEW GENERATION INVESTMENT POLICIES
- PRINCIPLES FOR INVESTMENT POLICYMAKING
- NATIONAL INVESTMENT POLICY GUIDANCE
- GUIDANCE FOR INVESTMENT TREATIES
- ACTION MENU FOR INVESTMENT IN SDGs
- THE WAY FORWARD

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EXECUTIVE SUMMARY

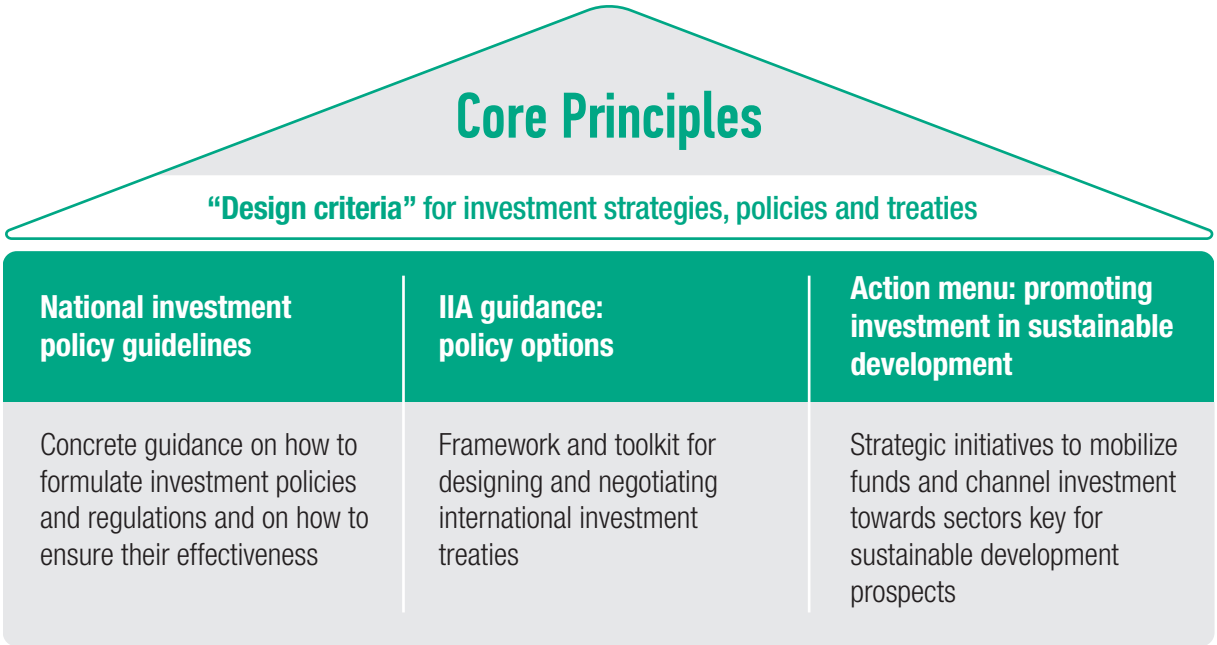
Mobilizing investment and ensuring that it contributes to sustainable development is a priority for all countries. A new generation of investment policies is emerging, pursuing a broader and more intricate development policy agenda, while building or maintaining a generally favourable investment climate.

"New generation" investment policies place inclusive growth and sustainable development at the heart of efforts to attract and benefit from investment. They address specific investment policy challenges at the national and international levels. At the national level, these include integrating investment policy into development strategy, incorporating sustainable development objectives in investment policy and ensuring investment policy relevance and effectiveness. At the international level, there is a need to strengthen the development dimension of international investment agreements (IIAs), balance the rights and obligations of States and investors, and manage the systemic complexity of the IIA regime. "New generation" investment policies further incorporate innovative investment promotion and facilitation mechanisms – at the national and international levels – to stimulate investment specifically geared towards sustainable and inclusive growth, including infrastructure, renewable energy, water and sanitation, food security, health and education (sustainable development goals-related sectors).

"New generation" investment policies place inclusive growth and sustainable development at the heart of efforts to attract and benefit from investment.

Figure 1. Structure and components of UNCTAD's Investment Policy Framework

Investment Policy Framework for Sustainable Development



UNCTAD's Investment Policy Framework consists of an overarching set of Core Principles for Investment Policymaking that serve as design criteria for three sets of operational guidelines or action menus: (i) guidelines for national investment policies, (ii) guidance for the design and use of IIAs, and (iii) an action menu for the promotion of investment in sectors related to the sustainable development goals.

The *national investment policy guidelines (i)* contain advice on policy action at the strategic, normative, and administrative levels.

In national investment policymaking, action is needed at the strategic, normative, and administrative levels.

- At the strategic level, policymakers should ground investment policy in a broad road map for economic growth and sustainable development. They should define the roles of public, private, domestic and especially foreign direct investment in development strategy. At this level it is also important to develop policies to harness investment for productive capacity building and to enhance international competitiveness, with critical elements including human resources and skills development, technology and know-how, infrastructure development, and enterprise development.
- At the normative level, through the setting of rules and regulations, policymakers can promote and regulate investment that is geared towards sustainable development goals. Positive development impacts of FDI do not always materialize automatically and FDI can have negative side-effects. Reaping the development benefits from investment requires regulations covering policy areas beyond investment policies per se, such as trade, taxation, intellectual property, competition, labour market regulation, environmental policies and access to land. While laws and regulations are the basis of investor responsibility, voluntary CSR initiatives and standards are increasingly influencing corporate practices, behaviour and investment decisions. Governments can build on them to complement the regulatory framework and maximize the development benefits of investment.
- At the administrative level, through appropriate implementation and institutional mechanisms, policymakers can ensure the continued relevance and effectiveness of investment policies. Measuring policy effectiveness is a critical aspect of investment policymaking. Investment policy should be based on a set of explicitly formulated policy objectives with clear priorities and time frames. Assessment of progress in policy implementation and verification of the application of rules and regulations at all administrative levels is equally important.

The guidance on *international investment policies (ii)* set out in UNCTAD's Investment Policy Framework provides options for the design of provisions in investment agreements, with an analysis of sustainable development implications. This principally implies four areas of evolution in treaty-making practice.

- Incorporating concrete commitments to promote and facilitate investment for sustainable development. Options to improve the investment promotion aspect of treaties include concrete facilitation mechanisms (information sharing, investment promotion forums), outward investment promotion schemes (insurance and guarantees), joint investment promotion initiatives, and technical assistance and capacity-building initiatives targeted at sustainable investment.
- Balancing State commitments with investor obligations and promoting responsible investment. Investor obligations could be the basis for stipulating in the IIA the consequences of an investor's failure to comply with domestic laws. In addition, IIAs could refer to commonly recognized international standards and support the spread of CSR standards.
- Ensuring an appropriate balance between protection commitments and regulatory space for development. Countries can safeguard the right to regulate by clarifying the scope and meaning of treaty provisions such as the fair and equitable treatment standard and expropriation, and by using specific flexibility mechanisms such as exceptions and reservations.
- Shielding host countries from unjustified liabilities and high procedural costs. Shielding countries from unjustified liabilities and excessive procedural costs through treaty design involves looking at options both in the way investment dispute settlement is conducted and in the scope and application of substantive clauses.

The framework's guidance on IIAs contains a comprehensive compilation of policy options available to IIA negotiators. This includes options that clarify or circumscribe key IIA protection standards (e.g. most-favoured nation (MFN) treatment, fair and equitable treatment (FET) or indirect expropriation), options that strengthen the right to regulate (e.g. exceptions for public policies or national security), options that improve investment dispute settlement (clauses for improving investor-State dispute settlement, State-State dispute settlement or dispute prevention), clauses aimed at promoting and facilitating investment and clauses aimed at ensuring responsible investor behaviour.

These areas of evolution are also relevant for "pre-establishment IIAs", i.e. agreements that – in addition to protecting established investors – contain binding rules regarding the establishment of new investments. As a growing number of countries opt for the pre-establishment approach, it is crucial to ensure that any market opening through IIAs is in line with host

IIA reform focuses on safeguarding the right to regulate, improving dispute settlement, more effective promotion and facilitation, and fostering responsible investment.

countries' development strategies. Relevant provisions opt for selective liberalization, containing exceptions and reservations well designed to protect a country from overcommitting and/or ensuring flexibilities in the relevant treaty obligations.

Taken together, the options for the design and use of IIAs can support the ongoing process of reform towards a future architecture of international investment governance that is more conducive to sustainable development.

The *action menu for the promotion of investment in priority sectors for sustainable development (iii)* presents a range of policy options to respond to the challenge of mobilizing funds and channeling investment towards areas that often remain under-served by private investors:

- A new generation of investment promotion and facilitation. Establishing investment development agencies to develop and market pipelines of bankable projects in relevant sectors and to actively facilitate such projects.
- Sustainable-development-oriented investment incentives. Transforming investment incentive schemes from purely "location-based" incentives towards "sustainability-based" incentives, aiming to promote investment in relevant sectors and conditional upon their sustainable development contribution.
- Regional Investment Compacts. Launching regional initiatives towards the promotion of sustainability-driven investment, especially for cross-border infrastructure development and regional clusters of firms operating in relevant sectors (e.g. green zones).
- New forms of partnership for sustainability-driven investments. Establishing partnerships between outward investment agencies in home countries and investment promotion agencies (IPAs) in host countries for the purpose of marketing relevant investment opportunities, provision of investment incentives and facilitation services for projects, and joint monitoring and impact assessment.

A key challenge is promoting investment in areas that make the greatest contribution to sustainable development. This requires a new generation of investment promotion and facilitation strategies, tools, institutions and partnerships.

UNCTAD's Investment Policy Framework aims to serve as a point of reference for policymakers in formulating national investment policies, in negotiating or reviewing IIAs, and in designing concrete policy initiatives to promote investment in priority sectors for sustainable development. It provides a common language for discussion and cooperation at national and international levels. It has been designed as a "living document" and incorporates an online version that aims to establish an interactive, open-source platform, inviting the international community to exchange views, suggestions and experiences on the framework for the inclusive and participative development of future investment policies.

INTRODUCTION: AN INVESTMENT POLICY FRAMEWORK FOR SUSTAINABLE DEVELOPMENT

At a time of pressing social and environmental challenges, harnessing economic growth for sustainable and inclusive development is more important than ever. Investment is a primary driver of such growth. Mobilizing investment and ensuring that it contributes to sustainable development objectives is therefore a priority for all countries and for developing countries in particular.

The policy environment for cross-border investment is subject to constant change. At the national level, governments continue to adopt investment policy measures (at a rate of around 100 annually over the past decade according to UNCTAD's monitoring of such measures), not to speak of countless measures taken every year that influence the overall business environment for investors. At the international level, new investment agreements have been concluded at a rate of more than one per fortnight for the past few years. At the level of "soft law", the universe of codes and standards that govern the behavior of corporate investors also continues to expand.

A new generation of investment policies is taking shape, pursuing a broader and more intricate development policy agenda, while building or maintaining a generally favourable investment climate.

Together these changes are gradually giving rise to a new generation of investment policies, pursuing a broader and more intricate development policy agenda, while building or maintaining a generally favourable investment climate. "New generation" investment policies place inclusive growth and sustainable development at the heart of efforts to attract and benefit from investment. They aim to operationalize sustainable development in concrete measures and mechanisms at the national and international levels, and at the level of policymaking and implementation.

To help policymakers address the challenges posed by the emerging new agenda, UNCTAD's 2012 *World Investment Report* launched the Investment Policy Framework for Sustainable Development. The framework consists of a set of Core Principles for investment policymaking, guidelines for national investment policies, and guidance for policymakers on how to engage in the international investment policy regime, in the form of options for the design and use of international investment agreements (IIAs).

In the three years since its launch, the UNCTAD Investment Policy Framework has served as a reference for many policymakers in formulating national investment policies and in negotiating investment agreements. It served as the basis for capacity building on investment policy, especially through UNCTAD's technical assistance work (Investment Policy Reviews). And it acted as a point of convergence in international debates on investment issues, e.g. during UNCTAD's World Investment Forums, IIA Conferences and other intergovernmental meetings.

UNCTAD's Investment Policy Framework helps policymakers address the challenges posed by the new agenda.

New insights gained through policy debates and technical assistance experience, feedback received from experts – including through the Investment Policy Hub, which provides a platform for "open sourcing" of best practice investment policies – as well as new policymaking priorities have now accumulated to the point that an update of the policy framework is opportune.

The update broadly includes three areas of innovation.

First, new insights and feedback have been incorporated in both the national investment policy guidelines and the IIA menu of options. The latter also reflects ongoing efforts in the international community to reform international investment governance.

Second, developments in international investment policymaking have made it necessary to elaborate on the liberalization or "pre-establishment" component in the IIA menu of options.

Third, the update comes in a year in which the international community is defining its future sustainable development objectives, covering such areas as poverty reduction, food security, health, education and climate change. In its 2014 *World Investment Report*, UNCTAD presented an Action Plan for Investment in Sustainable Development to support this effort. The updated framework incorporates concrete policy measures from the Action Plan aimed at promoting investments with a specific sustainable development orientation.

UNCTAD's Investment Policy Framework will continue to serve as the basis for technical assistance and for international investment policy discussions. And it will continue to represent a "living document", open for feedback through UNCTAD's Investment Policy Hub.

The remainder of this document first details the drivers of change in the investment policy environment – introducing a "new generation" of investment policies – and the challenges that need to be addressed in a comprehensive investment policy framework (chapter I). It then proposes a set of Core Principles for investment policymaking, which serve as "design criteria" for national and international investment policies (chapter II). Chapters III and IV provide concrete policy guidance, presenting a framework for national investment policies and options for the formulation and negotiation of international investment agreements (IIAs), with a particular focus on sustainable development-friendly options. Chapter V complements the policy guidance with a menu of innovative actions to promote investment specifically in areas key for sustainable development and inclusive growth that are often under-served by private investors, such as infrastructure, renewable energy, water and sanitation, food security, health and education (Sustainable Development Goals-related sectors). The final chapter looks at the way forward, suggesting how policymakers and the international development community could make use of UNCTAD's Investment Policy Framework, and how it could be further improved. It also presents a wider picture for the international community, proposing a "Big Push for Investment in Sustainable Development" and a set of concrete action packages to achieve this.

I. A "NEW GENERATION" OF INVESTMENT POLICIES

1. THE CHANGING INVESTMENT POLICY ENVIRONMENT

Global megatrends form the backdrop for the emerging new generation of investment policymaking.

Investment policy is not made in a vacuum. It is made in a political and economic context that, at the global and regional levels, has been buffeted over the last decade by a series of crises in the areas of finance, food security and the environment, and that faces persistent global imbalances and social challenges, especially with regard to poverty alleviation. These crises and challenges are having profound effects on the way policy is shaped at the global level. First, the economic and financial crisis has accentuated a longer-term shift in economic weight from developed countries to emerging markets. Global challenges such as food security and climate change, where developing country engagement is an indispensable prerequisite for any viable solution, have further added to a greater role for those countries in global policymaking. Second, the financial crisis in particular has boosted the role of governments in the economy, both in the developed and the developing world. Third, the nature of the challenges, which no country can address in isolation, makes better international coordination imperative. And fourth, the global political and economic context and the challenges that need to be addressed – with social and environmental concerns taking center stage – are leading policymakers to reflect on an emerging new development paradigm that places inclusive and sustainable development goals on the same footing as economic growth and development goals.

Trends in investment policy naturally mirror these developments.

There have been fundamental changes in the investment and investor landscape.

The investment landscape is changing, with increasing weight for developing countries.

Developing countries and economies in transition are now primary FDI destinations, and their importance as FDI recipients continues to increase. In 2010, for the first time, developing countries received more than half of global FDI flows – they are now at 55 per cent. This increases the opportunities for strategic investment targeting, promotion and protection policies in developing countries.

Emerging economies have not only become important recipients of FDI, they are increasingly large investors themselves, with their share in world outflows now more than one third. While these countries might previously have been more concerned with the pressure they faced to provide protection for investments made by others, they now also consider the security and treatment of their own investors' interests abroad.

There are also new types of investors on the scene. State-owned enterprises (SOEs) are important FDI players. Although they account for only 1 per cent of the total number of multinational enterprises, their overseas investments amount to roughly 10 per cent of global FDI flows. Sovereign wealth funds (SWFs), similarly, are gaining importance as FDI players. Their total FDI stock amounted to some $160 billion in 2014, and their overseas investments make up less than 2 per cent of global FDI flows.

But with total assets under management of some $7 trillion, the scope for further direct investment in productive assets is significant.

Clearly the patterns and types of investment of these new players (in terms of home and host countries and in terms of investors) are different, and so are their policy priorities. Furthermore, it is necessary to be vigilant concerning waning support for open investment climates in developed market economies in the face of competition from increasingly active developing-country investors.

Governments are playing a greater role in the economy and are giving more direction to investment policy.

Governments have become decidedly less reticent in *regulating* and *steering* the economy. More and more governments are moving away from the hands-off approach to economic growth and development that prevailed previously.[1] Industrial policies and industrial development strategies are proliferating in developing and developed countries alike (*WIR11*). These strategies often contain elements of targeted investment promotion or restriction, increasing the importance of integrated and coherent development and investment policies.

Governments are also becoming more active in their efforts to promote the participation of domestic companies in global value chains (GVCs). They promote such participation through local capacity building, technological upgrading and investment promotion activities, such as matchmaking or the establishment of special economic zones. Expectations of governments' promotion efforts have become higher as they increasingly focus on the *quality* – and not only on the *quantity* – of investment (*WIR13*).

Governments are playing a more active role in the economy in general, which is reflected in investment policymaking.

Fears and, to some extent, evidence of job-less (or job-poor) growth in many regions are also adding pressure on governments to look for "*the right types*" of investment, and to adopt measures to maximize the job-creation impact of investment. In developed countries, such fears have at times sparked debate on whether and how to discourage domestic companies from investing abroad or to promote the repatriation of foreign investment back home. In developing countries, the same fears are fuelling the debate on whether investment is bringing enough jobs for the poor and is sufficiently inclusive.

A stronger role of the State also manifests itself with regard to other sustainability issues. New social and environmental regulations are being introduced or existing rules reinforced – all of which has implications for investment. In addition to regulatory activities, governments are increasing efforts to promote actively the move towards sustainable development, for example through the encouragement of low-carbon FDI. They are also placing more emphasis on corporate responsibility by promoting the adoption of private codes of corporate conduct.

The trend for policymakers to intervene more in the economy and, to an extent, to steer investment activity, is visible in the share of regulatory and restrictive policies in total investment policy measures, which has increased in most of the last ten years (although investment liberalization and promotion measures remain dominant). This trend reflects, in part, a renewed realism about the economic and social costs of unregulated market forces but it also gives rise to concerns that an accumulation of regulatory activities may gradually increase the risk of over-regulation or investment protectionism that hinders inward and outward FDI (see box 1).

Box 1. Defining investment protectionism

Despite the fact that international policy forums at the highest level (e.g. the G-20[2]) frequently make reference to "investment protectionism", there is no universally agreed definition of the term. Different schools of thought take different approaches.

Broadly, protectionist measures related to investment would include: (1) measures directed at foreign investors that explicitly or "de facto" discriminate against them (i.e. treating them differently from domestic investors) and that are designed to prevent or discourage them from investing in, or staying in, the country. And (2) measures directed at domestic companies that require them to repatriate assets or operations to the home country or that discourage new investments abroad.[3] In this context, "measures" refer to national regulatory measures, but also include the application of *administrative procedures* or, even less tangible, *political pressure*.

The above reasoning ignores any possible *justification* of investment protectionism – i.e. measures may be motivated by legitimate policy concerns such as the protection of national security, public health or environmental objectives, or a desire to increase the contribution of FDI to economic development. It also does not refer to any assessment of *proportionality* of measures relative to such legitimate policy concerns. Nor does it attempt to assess the *legality* of relevant measures under any applicable international normative framework (whether investment-specific, i.e. international investment agreements; trade-related, e.g. WTO rules; or otherwise). Disregarding these considerations is analogous to the situation in trade, where a tariff may be applied to imports for legitimate policy reasons and may be legal under WTO rules, but would still be considered a protectionist measure in the economist's lexicon.

From a development perspective this approach is clearly unsatisfactory: measures taken for legitimate public policy objectives, relevant and proportional to those objectives and taken in compliance with relevant international instruments, should not be considered protectionist. The challenge lies in defining the boundaries of legitimacy, relevance and proportionality, in order to distinguish between measures taken in good faith for the public good and measures with underlying discriminatory objectives.

For many policymakers the term "protectionism" has a negative connotation. The lack of a common language among policymakers and the investment community – one country's protectionism is another country's industrial policy – is not helpful to efforts to maintain an international investment policy environment that aims to balance openness and pursuit of the public good while minimizing potentially harmful distortionary effects on investment flows.

Source: UNCTAD.

There is a greater need for global coordination on investment policy.

The need to address common sustainable development challenges and to respond effectively to global economic and financial turmoil to avoid future crises, has instigated calls for new models of global economic governance. In the area of investment, there are compelling reasons for such improved international coordination. It could help keep protectionist tendencies and discriminatory treatment of foreign investors in check. Further, in a world in which governments increasingly "compete" for their preferred types of investment it could help avoid a "race to the bottom" in regulatory standards or a "race to the top" in incentives.

There is a greater need for global coordination on investment policy, and for improved international investment governance.

A number of specific investment issues accentuate the need for better global coordination on investment policy as, by their nature, they can be addressed effectively only in a cooperative manner. For one, better international coordination would help overcome coherence problems posed by the highly atomized system of IIAs, consisting of close to 3,300 core treaties (i.e. bilateral investment treaties (BITs) and other agreements with investment provisions). Another example where policymakers are increasingly engaged in international dialogue is international tax cooperation. Unsustainable levels of public deficits and sovereign debt have made governments far more sensitive to tax avoidance, manipulative transfer pricing, tax havens and similar options available to multinational firms to unduly reduce their tax obligations in host and home countries. International tax and investment policies are both part of global investment governance, and there is a strong need for greater coherence (*WIR15*).

Other, non-financial, global challenges also require better coordination on investment, as witnessed by efforts to promote green investment in support of environmentally friendly growth, and international collaboration on investment in agriculture to help improve food security (*WIR09, WIR10*).

A new generation of investment policies is emerging.

As a result of the developments described above, a new generation of investment policies is emerging, pursuing a broader and more intricate development policy agenda within a framework that seeks to maintain a generally favourable investment climate. This new generation of investment policies has been in the making for some time, and is reflected in the dichotomy in policy directions over the last few years – with simultaneous moves to further liberalize investment regimes and promote foreign investment, on the one hand, and to regulate investment in pursuit of public policy objectives on the other. It reflects the recognition that liberalization, if it is to generate sustainable development outcomes, has to be accompanied – if not preceded – by the establishment of proper regulatory and institutional frameworks. The key policy challenge is to strike the right balance between regulation and openness (Epilogue *WIR10*).

"New generation" investment policies place inclusive growth and sustainable development at the heart of efforts to attract and benefit from investment. Sustainable development issues – including environmental, social and poverty alleviation concerns – as well as investor responsibility in these areas, are not "new" in and by themselves. However, to date, the myriad of solutions and options developed over the years to address sustainable development concerns have not been part and parcel of mainstream investment policymaking, and the international consensus on sustainable development is not reflected in it. "New generation" investment policies aim to *systematically integrate* sustainable development and *operationalize* it in concrete measures and mechanisms at the national and international level, and at the level of policymaking and implementation.

Broadly, "new generation" investment policies are characterized by (i) a recognition of the role of investment as a primary driver of economic growth and development and the consequent realization that investment policies are a *central part of development strategies*; and (ii) a desire to pursue sustainable development through *responsible investment*, placing social and environmental goals on the same footing as economic growth and development objectives. Furthermore, (iii) a shared recognition of the need to *improve the effectiveness* of policies to promote and facilitate investment. These three broad aspects of "new generation" investment policies translate into specific investment policy challenges at the national and international levels.

A key investment policy challenge is to strike the right balance between regulation and openness.

2. KEY INVESTMENT POLICY CHALLENGES

At the national level, key investment policy challenges are (table 1):

- To *connect the investment policy framework to an overall development strategy* or industrial development policy that works in the context of national economies, and to *ensure coherence with other policy areas*, including overall private sector or enterprise development, and policies in support of technological advancement, international trade and job creation. "New generation" investment policies increasingly incorporate targeted objectives to channel investment to areas key for economic or industrial development and for the build-up, maintenance and improvement of productive capacity and international competitiveness (see, for example, *WIR13* on investment policies and development in the context of global value chains (GVCs)).
- To *ensure that investment supports sustainable development and inclusiveness* objectives. Investment policymaking will focus increasingly on *qualitative* aspects of investment. Because the behaviour of firms, including international investors, with respect to social and environmental issues is driven in part by corporate responsibility standards developed outside the traditional regulatory realm, one aspect of this challenge is finding the right balance between regulatory and private sector initiatives. A focus on sustainable development objectives also implies that investment policy puts increasing emphasis on the promotion of specific *types* of investment, e.g. "green investments" and "low-carbon investment" (*WIR10*), or in more broadly defined priority sectors for sustainable development (*WIR14*).

Table 1. National investment policy challenges

Integrating investment policy in development strategy	• Channeling investment to areas key for the build-up of productive capacity and international competitiveness • Ensuring coherence with the host of policy areas geared towards overall development objectives
Incorporating sustainable development objectives in investment policy	• Maximizing positive and minimizing negative impacts of investment • Fostering responsible investor behaviour
Ensuring investment policy relevance and effectiveness	• Building stronger institutions to implement investment policy • Measuring the sustainable development impact of investment

- To *ensure continued investment policy relevance and effectiveness*, building stronger institutions to implement investment policy and to manage investment policy dynamically, especially by measuring the sustainable development impact of policies and responding to changes in the policy environment. With the greater role that governments are assuming in steering investment to support sustainable development

objectives, and with the selective departure from an open and liberal approach to investment, comes greater responsibility on the part of policymakers to ensure the effectiveness of their measures, especially where such measures imply restrictions on the freedom of economic actors or outlays of public funds (e.g. in the case of incentives or the establishment of special economic zones).

Similarly, *at the international level,* the changing investment policy environment is giving rise to three broad challenges (table 2):

- To *strengthen the development dimension* of the international investment policy regime. In the policy debate this development dimension principally encompasses two aspects:
  - Policymakers in some countries, especially those seeking to implement industrial development strategies and targeted investment measures, have found that IIAs can unduly constrain national economic development policymaking.
  - Many policymakers have observed that IIAs are focused almost exclusively on protecting investors and do not do enough to promote investment for development.
- To adjust the *balance between the rights and obligations of States and investors*, making it more even. IIAs currently do not set out any obligations on the part of investors in return for the protection rights they are granted. Negotiators could consider including obligations for investors to comply with national laws of the host country. In addition, and parallel to the debate at the level of national policies, corporate responsibility initiatives, standards and guidelines for the behaviour of international investors increasingly shape the investment policy landscape. Such standards could serve as an indirect way to add the sustainable development dimension to the international investment policy landscape, although there are concerns among developing countries that they may also act as barriers to investment and trade.

Table 2. International investment policy challenges

Strengthening the development dimension of IIAs	• Safeguarding policy space for sustainable development needs • Making investment promotion provisions more concrete and consistent with sustainable development objectives
Balancing rights and obligations of states and investors	• Reflecting investor responsibilities in IIAs • Learning from and building on CSR principles
Managing the systemic complexity of the IIA regime	• Dealing with gaps, overlaps and inconsistencies in IIA coverage and content and resolving institutional and dispute settlement issues • Ensuring effective interaction and coherence with other public policies (e.g. climate change, labour, taxation) and systems (e.g. trading, financial)

To *resolve issues stemming from the increasing complexity of the international investment policy regime*. The current regime is a system of thousands of treaties (mostly bilateral investment treaties, free trade agreements with investment provisions, and regional agreements), many ongoing negotiations and multiple dispute-settlement mechanisms, which nevertheless offers protection to only two-thirds of global FDI stock, and which covers only one-fifth of bilateral investment relationships (*WIR11*). Most governments continue to participate in the process of adding ever more agreements to the system, despite the fact that many are not fully satisfied with its overall design. It has a number of systemic problems, including gaps, overlaps and inconsistencies in coverage and content; ambiguities in treaty interpretation by arbitral tribunals; onerous arbitration procedures and unpredictability of arbitration awards. Also, the "interconnect" between international investment policies and other policy areas such as trade, finance, competition or environmental (e.g. climate change) policies, is absent.

3. A GLOBAL STRATEGIC CHALLENGE: PROMOTING INVESTMENT IN SUSTAINABLE DEVELOPMENT

Faced with common global economic, social and environmental challenges, the international community is working to find resources and financing solutions to make progress on poverty reduction, food security, human health and education, climate change mitigation, and a range of other objectives across economic, social and environmental pillars.

The level of investment needed, especially in developing economies, in those sectors that are key for countries' sustainable development prospects (see *WIR14*), which include basic infrastructure (roads, rail and ports; power stations; water and sanitation), food security (agriculture and rural development), climate change mitigation and adaptation, health, and education (Sustainable Development Goals-related sectors), will require a step-change in both public and private investment.

Public sector funding capabilities alone will be insufficient to meet demands across all these sectors. However, today, the participation of the private sector in investment in priority SDG-related sectors is relatively low. Only a fraction of the worldwide investment by transnational corporations – as well as other directly invested assets, e.g. from institutional investors, private equity funds, sovereign wealth funds, among others – is in SDG-related sectors, and even less in developing countries, particularly the poorest ones (LDCs).

The potential for increasing private sector participation is greater in some sectors than in others. Infrastructure sectors, such as power and renewable energy, transport and water and sanitation, are natural candidates for greater private sector participation, under the right conditions and with appropriate safeguards. Other sectors are less likely to generate significantly higher amounts of private sector interest, either because it is difficult to design risk-return models attractive to private investors (e.g. climate change adaptation), or because they are at the core of public service responsibilities and highly sensitive to private sector involvement (e.g. education and health care). Therefore, public investment remains fundamental and pivotal. However, because it is unrealistic to expect the public sector to meet all funding demands in many developing countries, strategic initiatives to increase private sector participation are of crucial importance.

Priority sectors for sustainable development (SDG-related sectors)

See WIR14 – Investing in the SDGs: an Action Plan

Sector	Description
Power	Investment in generation, transmission and distribution of electricity
Transport	Investment in roads, airports, ports and rail
Telecommunications	Investment in infrastructure (fixed lines, mobile and internet)
Water and sanitation	Provision of water and sanitation to industry and households
Food security and agriculture	Investment in agriculture, research, rural development, safety nets, etc.
Climate change mitigation	Investment in relevant infrastructure, renewable energy generation, research and deployment of climate-friendly technologies, etc.
Climate change adaptation	Investment to cope with impact of climate change in agriculture, infrastructure, water management, coastal zones, etc.
Eco-systems/biodiversity	Investment in conservation and safeguarding ecosystems, marine resource management, sustainable forestry, etc.
Health	Infrastructural investment, e.g. new hospitals
Education	Infrastructural investment, e.g. new schools

Such strategic investment promotion initiatives must address key constraints to the channeling of funds to sustainable development projects, ensuring that investment makes its way to concrete projects on the ground in developing countries, and especially LDCs. They must do so in the context of an overall enabling environment for investment, with appropriate safeguards in place. Those safeguards are especially important because increasing the involvement of private investors in SDG-related sectors, many of which are sensitive or of a public service nature, leads to a number of policy dilemmas (table 3).

1

A first dilemma relates to the risks involved in increased private sector participation in sensitive sectors. Private sector service provision in health care and education in developing countries, for instance, can have negative effects on standards unless strong governance and oversight is in place, which in turn requires capable institutions and technical competencies. Private sector involvement in essential infrastructure industries, such as energy and water supply, can be sensitive in developing countries where this implies the transfer of public sector assets to the private sector. Private sector operations in infrastructure such as water and sanitation are particularly sensitive because of the basic-needs nature of these sectors.

2

A second dilemma stems from the need to maintain quality services affordable and accessible to all. The fundamental hurdle for increased private sector contributions to investment in SDG-related sectors is the inadequate risk-return profile of many such investments. Many mechanisms exist to share risks or otherwise improve the risk-return profile for private sector investors. Increasing returns, however, must not lead to the services provided by private investors ultimately becoming inaccessible or unaffordable for the poorest in society. Allowing energy or water suppliers to cover only economically attractive urban areas while ignoring rural needs, or to raise prices of essential services, is not a sustainable outcome.

3

A third dilemma results from the respective roles of public and private investment. Despite the fact that public sector funding shortfalls in key sectors make it desirable that private sector investment increase, public sector investment remains fundamental and pivotal. Governments – through policy and rulemaking – need to be ultimately accountable with respect to provision of vital public services and overall sustainable development strategy.

These dilemmas are reflected in a key constraint to channeling funds into SDG-related sectors, in the form of regulatory barriers. Investment in sustainable-development projects may be discouraged by an unwelcoming investment climate related to the specific target sectors. Investors in these sectors often face specific regulatory, administrative or other policy-related hurdles. Some sectors may be closed either to private investors in general, or to foreign investors in particular.

Another key constraint takes the form of often inadequate risk-return ratios. Risks related to sustainable-development investment projects can occur at the country and policy level (e.g. legal protection for investment); at the market or sector level (e.g. uncertain demand); and at the project (financial) level. For example, investments in agriculture or infrastructure are subject to uncertainty and concerns about local demand and spending power of the local population, ownership or access to sensitive resources (e.g. land) and the very long payback periods involved. As a result, investors, especially those not accustomed to investing in relevant sectors in developing countries, often demand higher hurdle rates of return for investment in countries with higher (perceived or real) risks.

Table 3. Promoting investment in SDG-related sectors: policy challenges

Resolving policy tensions associated with private sector engagement	• Balancing public and private investment and mitigating the risks involved with greater private sector participation in sensitive sectors • Alleviating regulatory barriers to investment while maintaining appropriate safeguards
Finding mechanisms to overcome inadequate risk-return ratios	• Dealing with high risk perceptions • Helping investors mitigate risks and designing attractive risk-return profiles and risk-sharing models
Gearing up for far more demanding investment promotion and facilitation	• Overcoming a lack of investor expertise and attention • Prioritizing, preparing and packaging concrete sustainable-development investment projects

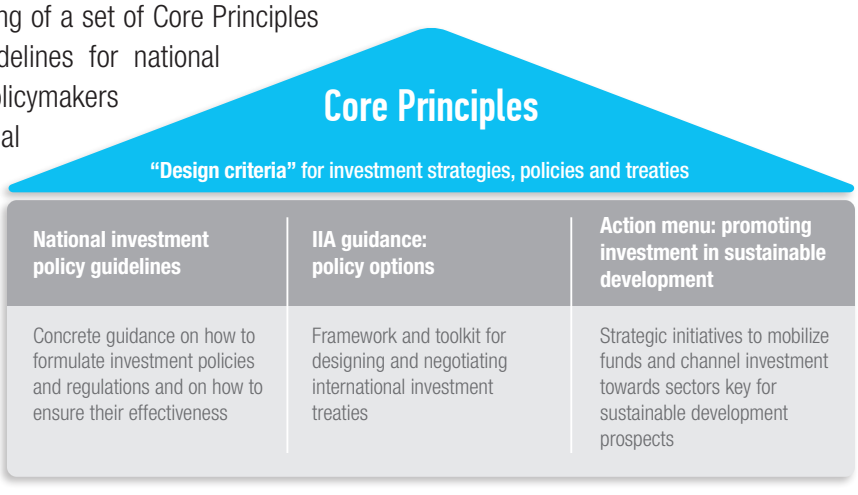
A final constraint relates to the far more demanding investment promotion and facilitation process required for sustainable-development investment projects. There is currently a lack of information and effective packaging and promotion of target investment projects. Investment opportunities in commercial activities are usually clearly delineated; location options may be pre-defined in industrial zones; the investment process and associated rules are clearly framed; and investors are familiar with the process of appraising risks and assessing potential financial returns on investment in their own sector. SDG-related sectors are more complex.

In investment projects in areas such as infrastructure, energy, health, a prior political process is involved where political priorities need to be defined, regulatory preparation is needed (e.g. planning permissions and licenses, market rules,…) and feasibility studies carried out. In addition, smaller projects may not easily provide the scale that large investors require. Therefore, aggregation and packaging can be necessary. Also, commercial investments are often more of a "push" nature, where investors look for opportunities, as opposed to sustainable-development projects which can be more of a "pull" nature, where local needs drive the shaping of investment opportunities. Effective promotion and information provision is therefore even more important, also because investors face greater difficulty in appraising potential investment risks and returns due to a lack of historical data and investment benchmarks to make meaningful comparisons of performance.

More sophisticated and engaged investment project preparation, packaging and marketing is all the more important because of the lack of expertise on the part of many investors. The private sector investors that developing countries are often aiming to attract to large-scale projects such as infrastructure or energy often have not traditionally been engaged in direct investment in these countries (particularly low-income economies) or sectors, and they may not have the necessary expertise in-house to appraise investments, to manage the investment process (and, where applicable, to manage operations).

4. ADDRESSING THE CHALLENGES: A POLICY FRAMEWORK AND ACTION MENU

To address the challenges discussed in the previous section, UNCTAD has developed its comprehensive Investment Policy Framework for Sustainable Development, consisting of a set of Core Principles for investment policymaking, guidelines for national investment policies, guidance for policymakers on how to engage in the international investment policy regime in the form of options for the design and use of IIAs, and an action menu of strategic investment promotion initiatives to help channel investment to priority sectors for sustainable development (box 2).



The three operational elements of UNCTAD's Investment Policy Framework are strictly interrelated – all three are placed under the roof of the Core Principles. National and international investment policies need to be consistent and coherent. And strategic investment promotion initiatives aimed at channeling more private investment into priority sectors for sustainable development depend on the enabling policy framework and safeguards put in place by national and international investment policies.

The framework builds on the experience and lessons learned of UNCTAD and other organizations in designing investment policies for development. By consolidating good practices, it also establishes a benchmark for assessing the quality of a country's policy environment for foreign investment – taking into account that one single policy framework cannot address the specific investment policy challenges of individual countries (see boxes 4, 6 and 7 on the need for custom-designed investment policy advice).

Although there are a number of existing international instruments that provide guidance to investment policymakers,[4] UNCTAD's Investment Policy Framework distinguishes itself in several ways.

1 First, it is meant as a comprehensive instrument dealing with all aspects of national and international investment policymaking.

2 Second, it puts a particular emphasis on the relationship between foreign investment and sustainable development, advocating a balanced approach between the pursuit of purely economic growth objectives by means of investment liberalization and promotion, on the one hand, and the need to protect people and the environment, on the other hand.

3 Third, it underscores the interests of developing countries in investment policymaking.

4 Fourth, it is neither a legally binding text nor a voluntary undertaking between States, but expert guidance by an international organization, leaving national policymakers free to "adapt and adopt" as appropriate.

Box 2. Scope of UNCTAD's Investment Policy Framework

This box addresses a number of key questions relating to the scope, coverage and target audience of UNCTAD's Investment Policy Framework:

What policies are covered by the framework?

The framework is meant to provide guidance on investment policies, with a particular focus on FDI. This includes policies with regard to the establishment, treatment and promotion of investment. In addition, a comprehensive investment policy framework needs to look beyond investment policies per se and include investment-related aspects of other policy areas.

Does the framework deal with investment across all sectors or only in "sustainable development goals-related sectors"?

The policy guidance for national and international investment policies relates to the overall framework for investment across all economic sectors. The action menu of strategic initiatives focuses on promoting investment in specific sectors that are key to countries' sustainable development prospects.

Does the framework deal with national and international investment policies?

Investment policies and related policy areas covered by the framework comprise national and international policies, as coherence between the two is fundamental.

Does the framework cover domestic and foreign investment?

The focus on FDI is evident in sections on, for example, the entry and establishment of investment, the promotion of outward investment and the chapter on international investment policies. However, many of the guidelines in the chapter on national investment policies have relevance for domestic investment as well.

Does the framework consider portfolio investment?

The framework focuses on direct investment in productive assets. Portfolio investment is considered only where explicitly stated in the context of IIAs, which in many cases extend coverage beyond direct investment. New elements in the updated framework, in particular the policy packages included in the "global push for investment in sustainable development" do address portfolio investment and the capital market "supply side" in the context of the mobilization of funds for investment in SDG-related sectors.

Is the framework concerned with inward and outward investment?

The framework primarily offers policy advice for countries where the investment – domestic or foreign – is made, as this is typically the principal concern of investment policies. However, it does not ignore the fact that policies with regard to *outward* investment may also be part of a country's development strategy.

Is the framework addressed to policymakers from developing and developed countries?

The addressees of the investment policy framework are, in principle, both developing and developed countries. It has been designed with the particular objective to assist the former in the design of investment policies in support of sustainable development objectives, but is equally relevant for developed countries.

Does the framework focus on the attraction of investment or on its impact?

The policy guidelines serve a dual purpose. On the one hand, they intend to assist governments in improving the attractiveness of their countries as investment locations. To this end, they contain specific recommendations concerning the institutional set-up, the general business climate and the treatment of investors. On the other hand, they also provide guidance on how countries can maximize the sustainable development benefits from investment, in particular foreign investment.

Source: UNCTAD.

II. PRINCIPLES FOR INVESTMENT POLICYMAKING

1. SCOPE AND OBJECTIVES OF THE PRINCIPLES

The Core Principles for investment policymaking aim to guide the development of national and international investment policies. To this end, they translate the challenges of investment policymaking into a set of "design criteria" for investment policies. Taking the challenges discussed in the previous chapter as the starting point, they call for integrating investment policy in overall development strategies, enhancing sustainable development as part of investment policies, balancing rights and obligations of States and investors in the context of investment protection and promotion, including CSR into investment policymaking, and encouraging international cooperation on investment-related challenges.

The Core Principles are not a set of rules per se. They are an integral part of UNCTAD's Investment Policy Framework, as set out in this document, which attempts to convert them, collectively and individually, into a concrete set of policy guidelines for national investment policymakers and for negotiators of IIAs (chapters III and IV). As such, they do not always follow the traditional "policy areas" of a national investment policy framework, nor the usual articles of IIAs.

The Core Principles are grouped as follows:

- The overarching principle premises the framework by stating the overall objective of investment policymaking.
- Principles 1, 2, and 3 relate to the general process of policy development and the policymaking environment as relevant for investment policies.
- Principles 4 through 9 address the specifics and substance of investment policymaking.
- Principle 10 refers to cooperation in investment-related matters at the international level.

The design of the Core Principles has been inspired by various sources of international law and politics. Some of these instruments have importance for the entire set of the Core Principles as they relate – to various degrees – to sustainable development. Several other international instruments relate to individual Core Principles (see box 3).

Box 3. The origins of the Principles in international law

The Core Principles can be traced back to a wide range of existing bodies of international law, treaties and declarations.

The UN Charter (Article 55) promotes, *inter alia*, the goal of economic and social progress and development. The UN Millennium Development Goals call for a Global Partnership for Development. In particular, its Goal 8 (Target 12) encourages the further development of an open, rule-based, predictable, non-discriminatory trading and financial system, which includes a commitment to good governance, development, and poverty reduction, both nationally and internationally – concepts that apply equally to the investment system. The "Monterrey Consensus" of the UN Conference on Financing for Development of 2002 acknowledges that countries need to continue their efforts to achieve a transparent, stable and predictable investment climate, with proper contract enforcement and respect for property rights, embedded in sound macroeconomic policies and institutions that allow businesses, both domestic and international, to operate efficiently and profitably and with maximum development impact. The UN Johannesburg Plan of Implementation of September 2002, following up on the "Rio Declaration", calls for the formulation and elaboration of national strategies for sustainable development, which integrate economic, social and environmental aspects. The 4th UN Conference on LDCs in May 2011 adopted the Istanbul Programme of Action for the LDCs 2011-2020 with a strong focus on productive capacity-building and structural transformation as core elements to achieve more robust, balanced, equitable, and sustainable growth and sustainable development. Finally, the 2012 UNCTAD XIII Conference – as well as previous UNCTAD Conferences – recognized the role of FDI in the development process and called on countries to design policies aimed at enhancing the impact of foreign investment on sustainable development and inclusive growth, while underlining the importance of stable, predictable and enabling investment climates.

Several other international instruments relate to individual Core Principles. They comprise, in particular, the Universal Declaration of Human Rights and the UN Guiding Principles on Business and Human Rights, the Convention on the Establishment of the Multilateral Investment Guarantee Agency, the World Bank Guidelines on the Treatment of Foreign Direct Investment, the UN Global Compact, the OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and several WTO-related agreements, including the GATS, the TRIMs Agreement and the Agreement on Government Procurement.

Source: UNCTAD.

2. THE PRINCIPLES

Area		Core Principles
Investment for sustainable development		• The **overarching objective** of investment policymaking is to promote investment for inclusive growth and sustainable development.
1	Policy coherence	• Investment policies should be grounded in a country's overall development strategy. All policies that impact on investment should be coherent and synergetic at both the national and international level.
2	Public governance and institutions	• Investment policies should be developed involving all stakeholders, and embedded in an institutional framework based on the rule of law that adheres to high standards of public governance and ensures predictable, efficient and transparent procedures for investors.
3	Dynamic policymaking	• Investment policies should be regularly reviewed for effectiveness and relevance and adapted to changing development dynamics.
4	Balanced rights and obligations	• Investment policies should be balanced in setting out rights and obligations of States and investors in the interest of development for all.
5	Right to regulate	• Each country has the sovereign right to establish entry and operational conditions for foreign investment, subject to international commitments, in the interest of the public good and to minimize potential negative effects.
6	Openness to investment	• In line with each country's development strategy, investment policy should establish open, stable and predictable entry conditions for investment.
7	Investment protection and treatment	• Investment policies should provide adequate protection to established investors. The treatment of established investors should be non-discriminatory in nature.
8	Investment promotion and facilitation	• Policies for investment promotion and facilitation should be aligned with sustainable development goals and designed to minimize the risk of harmful competition for investment.
9	Corporate governance and responsibility	• Investment policies should promote and facilitate the adoption of and compliance with best international practices of corporate social responsibility and good corporate governance.
10	International cooperation	• The international community should cooperate to address shared investment-for-development policy challenges, particularly in least developed countries. Collective efforts should also be made to avoid investment protectionism.

3. ANNOTATIONS TO THE PRINCIPLES

THE PREMISE: INVESTMENT FOR SUSTAINABLE DEVELOPMENT

OVERARCHING PRINCIPLE

This **overarching principle** defines the overall objective of the Investment Policy Framework for Sustainable Development. It recognizes the need to promote investment not only for economic growth as such, but for growth that benefits all, including the poorest. It also calls for the mainstreaming of sustainable development issues – i.e. development that meets the needs of the present without compromising the ability of future generations to meet theirs – in investment policymaking, both at the national and international levels.

This principle is particularly important in the context of the action menu for the promotion of investment in sectors that are key for countries' sustainable development prospects. Together with other principles it can help resolve the policy dilemma's arising with greater private investor involvement in sensitive sectors and sectors with a public service nature. Promoting investment for inclusive growth and sustainable development implies:

- **Balancing the need for attractive risk-return rates with the need for accessible and affordable services.** This requires governments to pro-actively address market failures. It means placing clear obligations on investors and extracting firm commitments. And it implies making incentives or subsidies conditional on social inclusiveness. (See also principle 4.)
- **Balancing liberalization and the right to regulate.** This may require adopting selective, gradual or sequenced approaches to liberalization. It means balancing the rights and obligations of private sector operators in SDG-related sectors. And it implies maintaining flexibility and policy space, including in international commitments. (See also principles 5 and 6.)
- **Balancing a push for private investment with the continued fundamental role of public investment.** This calls for an explicit definition of complementary roles for public and private investment. It also means managing the interaction between investment policies and public policies, especially concerning SDG-related sectors. And it requires taking a holistic approach to investment across these sectors.

POLICY COHERENCE

PRINCIPLE 1

This principle recognizes that investment is a means to an end, and that investment policy should thus be integrated in an overarching development strategy. It also acknowledges that success in attracting and benefiting from investment depends not only on investment policy "stricto sensu" (i.e. entry and establishment rules, treatment and protection) but on a host of investment-related policy areas ranging from tax to trade to environmental and labour market policies. It recognizes that these policy

areas interact with each other and that there is consequently a need for a coherent overall approach to make them conducive to sustainable development and to achieve synergies. The same considerations apply with respect to the interaction between national investment policies and international investment rulemaking. Successful experiences with investment for development often involved the establishment of special agencies with a specific mandate to coordinate the work of different ministries, government units and policy areas, including the negotiation of IIAs.

PUBLIC GOVERNANCE AND INSTITUTIONS

PRINCIPLE 2

The concept of good public governance refers to the efficiency and effectiveness of government services, including such aspects as accountability, predictability, clarity, transparency, fairness, rule of law, and the absence of corruption. This principle recognizes the importance of good public governance as a key factor in creating an environment conducive to attracting investment. It also stresses the significance of a participatory approach to policy development as a basic ingredient of investment policies aimed at inclusive growth and fairness for all. The element of transparency is especially important, as in and by itself it tends to facilitate dialogue between public and private sector stakeholders, including companies, organized labour and non-governmental organizations (NGOs).

DYNAMIC POLICYMAKING

PRINCIPLE 3

This principle recognizes that national and international investment policies need flexibility to adapt to changing circumstances, while recognizing that a favourable investment climate requires stability and predictability. For one, different policies are needed at different development stages. New factors may emerge on the domestic policy scene, including government changes, social pressures or environmental degradation. International dynamics can have an impact on national investment policies as well, including through regional integration or through international competition for the attraction of specific types of foreign investment. The increasing role of emerging economies as outward investors and their corresponding desire better to protect their companies abroad drives change in investment policies as well.

The dynamics of investment policies also imply a need for countries continuously to assess the effectiveness of existing instruments. If these do not achieve the desired results in terms of economic and social development, or do so at too high a cost, they may need to be revised.

BALANCED RIGHTS AND OBLIGATIONS

PRINCIPLE 4

Investment policies need to serve two potentially conflicting purposes. On the one hand, they have to create attractive conditions for foreign investors. To this end, investment policies include features of investment liberalization, protection, promotion and facilitation. On the other hand, the overall regulatory framework of the host country has to ensure that any negative social or environmental effects are minimized. More regulation may also be warranted to find appropriate responses to crises (e.g. financial crisis, food crisis, climate change).

Against this background, this core principle suggests that the investment climate and policies of a country should be "balanced" as regards the overall treatment of foreign investors. Where and how to strike this balance is basically an issue for the domestic law of host countries and therefore requires adequate local capacities. International policies vis-à-vis foreign investors likewise play a role and – if not carefully designed – might tilt the balance in favour of those investors. The principle does not mean that each individual investment-related regulation of a host country would have to be balanced.

RIGHT TO REGULATE

PRINCIPLE 5

The right to regulate is an expression of a country's sovereignty. Regulation includes both the general legal and administrative framework of host countries as well as sector- or industry-specific rules. It also entails effective implementation of rules, including the enforcement of rights. Regulation is not only a State right, but also a necessity. Without an adequate regulatory framework, a country will not be attractive for foreign investors, because such investors seek clarity, stability and predictability of investment conditions in the host country.

The authority to regulate can, under certain circumstances, be ceded to an international body to make rules for groups of states. It can be subject to international obligations that countries undertake; with regard to the treatment of foreign investors this often takes place at the bilateral or regional level. International commitments thus reduce "policy space". This principle advocates that countries maintain sufficient policy space to regulate for the public good.

OPENNESS TO INVESTMENT

PRINCIPLE 6

This principle considers a welcoming investment climate, with transparent and predictable entry conditions and procedures, a precondition for attracting foreign investment conducive for sustainable development. The term "openness" is not limited to formal openness as expressed in a country's investment framework and, possibly, in entry rights granted in IIAs. Equally important is the absence of informal investment barriers, such as burdensome, unclear and non-transparent administrative procedures. At the same time, the principle recognizes that countries have legitimate reasons to limit openness to foreign investment, for instance in the context of their national development strategies or for national security reasons.

In addition, the issue of "openness" reaches beyond the establishment of an investment. Trade openness can be of crucial importance too, in particular, when the investment significantly depends on imports or exports.

INVESTMENT PROTECTION

PRINCIPLE 7

This principle acknowledges that investment protection, although only one among many determinants of foreign investment, can be an important policy tool for the attraction of investment. It therefore closely interacts with the principle on investment promotion and facilitation (principle 8). It has a national and an international component. Core elements of protection at the national level include, inter alia, the rule of the law, the principle of freedom of contract and access to courts. Key components of investment protection frequently found in IIAs comprise the principle of non-discrimination (national treatment and most-favoured nation treatment), fair and equitable treatment, protection in case of expropriation, provisions on movement of capital, and effective dispute settlement.

INVESTMENT PROMOTION AND FACILITATION

PRINCIPLE 8

Most countries have set up promotion schemes to attract and facilitate foreign investment. Promotion and facilitation measures often include the granting of fiscal or financial incentives, the establishment of special economic zones or "one-stop shops". Many countries have also set up special investment promotion agencies (IPAs) to target foreign investors, offer matchmaking services and provide aftercare.

The principle contains two key components. First, it stipulates that in their efforts to improve the investment climate, countries should not compromise sustainable development goals, for instance by lowering regulatory standards on social or environmental issues, or by offering

incentives that annul a large part of the economic benefit of the investment for the host country. Second, the principle acknowledges that, as more and more countries seek to boost investment and target specific types of investment, the risk of harmful competition for investment increases; i.e. a race to the regulatory bottom or a race to the top of incentives (with negative social and environmental consequences or escalating commitments of public funds). Investment policies should be designed to minimize this risk. This underlines the importance of international coordination (see principle 10 below).

CORPORATE GOVERNANCE AND RESPONSIBILITY

PRINCIPLE 9

This principle recognizes that corporate governance and CSR standards are increasingly shaping investment policy at the national and international levels. This development is reflected in the proliferation of standards, including several intergovernmental organization standards of the United Nations, the ILO, the IFC and the OECD, providing guidance on fundamental CSR issues;[5] dozens of multi-stakeholder initiatives; hundreds of industry association codes; and thousands of individual company codes (*WIR11*). Most recently, the UN Human Rights Council adopted a resolution endorsing the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.

CSR standards are voluntary in nature and so exist as a unique dimension of "soft law". The principle calls on governments to actively promote CSR standards and to monitor compliance with them. Promotion also includes the option to adopt existing CSR standards as part of regulatory initiatives, turning voluntary standards into mandatory requirements.

INTERNATIONAL COOPERATION

PRINCIPLE 10

This principle considers that investment policies touch upon a number of issues that would benefit from more international cooperation. The principle also advocates that particular efforts should be made to encourage foreign investment in LDCs.

Home countries can support outward investment conducive to sustainable development. For a long time, developed countries have provided investment guarantees against certain political risks in the host country or offered loans to companies investing abroad. The Multilateral Investment Guarantee Agency (MIGA) provides investment insurance at the international level. The principle builds upon examples of countries that have started to condition the granting of investment guarantees on an assessment of social and environmental impacts.

The importance of international cooperation also grows as more and more countries make use of targeted investment promotion policies. Better international coordination is called for to avoid a global race to the bottom in regulatory standards, or a race to the top in incentives, and to avoid a return of protectionist tendencies.

More international coordination, in particular at the regional level, can also help to create synergies so as to realize investment projects that would be too complex and expensive for one country alone. Another policy area that would benefit from more international cooperation is investment in sensitive sectors. For example, concerns about possible land grabs and the crowding out of local farmers by foreign investors have resulted in the development by the FAO, UNCTAD, the World Bank and IFAD of Principles for Responsible Investment in Agriculture (PRAI).

Some Core Principles relate to a specific investment policy area (e.g. openness to investment, investment protection and promotion, corporate governance and social responsibility) and can therefore relatively easily be traced to specific guidelines and options in the national and international parts of the framework. Other Core Principles (e.g. on public governance and institutions, balanced rights and obligations, the right to regulate) are important for investment policymaking as a whole. As a consequence, they are reflected in guidelines dispersed across the entire range of relevant policy issues covered by the framework.

The Core Principles interact with each other. The individual principles and corresponding guidelines therefore must not be applied and interpreted in isolation. In particular, the overarching rule within the policy framework – investment for sustainable development – has relevance for all subsequent principles. Integrating investment policies into sustainable development strategies requires a coherent policy framework. Good public governance is needed in its design and implementation. Sustainable development is an ongoing challenge, which underlines the importance of policymaking dynamics. And an investment policy framework needs to comprise elements of investment regulation and corporate governance, on the one hand, and openness, protection and promotion, on the other hand, thereby contributing to an investment climate with balanced rights and obligations for investors.

III. NATIONAL INVESTMENT POLICY GUIDANCE

This chapter translates the Core Principles for investment policymaking into concrete guidelines at the national level, with a view to addressing the policy challenges discussed in chapter I. To address these policy challenges – ensuring that investment policy is coherent with other policy areas supporting a country's overall development strategy; enhancing the sustainable development impact of investment and promoting responsible investment; and improving policy effectiveness, while maintaining an attractive investment climate – this chapter, including the detailed policy guidelines it contains, argues for policy action at three levels:

1. At the ***strategic*** level, policymakers should ground investment policy in a broad road map for economic growth and sustainable development – such as those set out in formal economic or industrial development strategies in many countries.

2. At the ***normative*** level, through the setting of rules and regulations, on investment and in a range of other policy areas, policymakers can promote and regulate investment that is geared towards sustainable development goals.

3. At the ***administrative*** level, through appropriate implementation and institutional mechanisms, policymakers can ensure continued relevance and effectiveness of investment policies.

The following sections will look at each of these levels in turn.

1. EMBEDDING INVESTMENT POLICY IN DEVELOPMENT STRATEGY

Many countries have elaborated explicit development strategies that set out an action plan to achieve economic and social objectives and to strengthen international competitiveness. These strategies will vary by country, depending on their stage of development, their domestic endowments and individual preferences, and depending on the degree to which the political and economic system allows or requires the participation of the State in economic planning. Because investment is a key driver of economic growth, a prerequisite for the build-up of productive capacity and an enabler of industrial development and upgrading, investment policy must be an integrated part of such development strategies (see box 4).

National investment policy should be geared towards the realization of national sustainable development goals and form an integral part of the overall development strategy

Box 4. Integrating investment policy in development strategy: UNCTAD's Investment Policy Reviews

UNCTAD's Investment Policy Review (IPR) programme was launched in 1999 in response to growing demand from member States for advice on FDI policy for development. The IPRs aim to provide an independent and objective evaluation of the policy, regulatory and institutional environment for FDI and to propose customized recommendations to governments to attract and benefit from increased flows of FDI. To date IPRs have been undertaken for 42 developing countries and transition economies, including 17 LDCs, of which 5 in post-conflict situations (box table 1).

Box table 1. Beneficiaries of the UNCTAD IPR programme, 1999 – 2015

Categories	Countries
Developing countries	Algeria, Botswana, Colombia, Republic of Congo, Dominican Republic, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Kenya, Mauritius, Morocco, Mongolia, Nigeria, Peru, Sri Lanka, Viet Nam
Transition economies	Belarus, Bosnia and Herzegovina, Kyrgyzstan, Macedonia (The former Yugoslav Republic of), Republic of Moldova, Tajikistan, Uzbekistan
Least developed countries	Bangladesh, Benin, Burkina Faso, Burundi, Djibouti, Ethiopia, Lesotho, Madagascar, Mauritania, Mozambique, Nepal, Rwanda, Sierra Leone, Sudan, Uganda, United Republic of Tanzania and Zambia

UNCTAD coordinates its IPR activities with the work of other development partners (including other UN agencies such as the UNDP and UNIDO, the OECD, the World Bank, national and regional development banks, local development institutions and NGOs) in order to create synergies.

IPRs are carried out through a structured process, starting with (i) a formal request from the national government to UNCTAD expressing commitment to policy reforms; (ii) preparation of the IPR advisory report and its presentation at a national workshop where government and national stakeholders review findings; (iii) intergovernmental peer review and sharing of best practices in investment policy in Geneva; (iv) implementation and follow-up technical assistance and capacity building; and (v) preparation of an implementation assessment and additional follow-up actions.

Substantively, key areas of recommendations common to nearly all IPRs conducted to date include: (i) Defining the strategic role of investment (and in particular FDI) in countries' development strategies; (ii) Reforming investment laws and regulations, including stregthening the sustainable development dimension of international investment agreements (IIAs); (iii) Designing policies and measures for attracting and benefitting from FDI; and (iv) Addressing institutional issues related to FDI promotion and facilitation.

A number of case-specific areas for recommendations or themes have included privatizations, the promotion of investment in target industries, promotion and facilitation of infrastructure investment, private sector development initiatives and business linkages, skill building and technology dissemination, and regional cooperation initiatives.

Source: UNCTAD; www.unctad.org/diae/ipr.

Defining the role of public, private, domestic and foreign direct investment

Mobilizing investment for sustainable development remains a major challenge for developing countries, particularly for LDCs. Given the often huge development financing gaps in these countries, foreign investment can provide a necessary complement to domestic investment, and it can be particularly beneficial when it interacts in a synergistic way with domestic public and private investment. Agriculture, infrastructure and climate change-related investments, among others, hold significant potential for mutually beneficial interaction between foreign and domestic, and public and private investment. For example, public-private partnerships (PPPs) have become important avenues for infrastructure development in developing countries, although experience has shown that high-quality regulatory and institutional settings are critical to ensure the development benefits of such infrastructure PPPs (*WIR08*).

Policymakers should consider carefully what role private, public and foreign investment should play in the context of their development strategies

Given the specific development contributions that can be expected from investment – private and public, domestic and foreign – policymakers should consider carefully what role each type can play in the context of their development strategies. In particular the opportunities and needs for *foreign* investment – intended as direct investment in productive assets (i.e. excluding portfolio investment) – differ from country to country, as does the willingness to open sectors and industries to foreign investors. Examples include the improvement of infrastructure, investment in skills and education, investments to secure food supply, or investments in other specific industries that are of crucial importance for a country.

Even looking at the role of foreign investment per se policymakers should be aware of different types, each with distinct development impacts. Greenfield investment has different impacts than investment driven by mergers and acquisitions (M&As). The former will generally imply a greater immediate contribution to productive capacity and job creation; the latter may bring benefits such as technology upgrading or access to international markets (or survival in case of troubled acquisition targets), but may also have negative effects (e.g. on employment in case of restructurings). Similarly, efficiency-seeking investments will have different development impacts than market-seeking investments, both with potential positive and negative contributions. And foreign investment also comes in different financial guises: FDI does not always imply an influx of physical capital (e.g. reinvested earnings), nor does it always translate into actual capital expenditures for the build-up of productive assets (e.g. retained earnings) and can sometimes behave in a manner not dissimilar to portfolio investment.

Furthermore, the role of foreign investors and multinational firms in an economy is not limited to FDI. They can also contribute to economic development through non-equity modes of international production (NEMs), such as contract manufacturing, services outsourcing, licensing, franchising, contract farming or other economic activities within global value chains. Because this form of involvement is based on a contractual relation between the foreign company and domestic business partners, it requires that the host country has sufficiently qualified local entrepreneurs, which calls for coordinated policies on investment, enterprise development and human resource development (*WIR11, WIR13*).

A key aspect in defining the role of investment in economic growth and development strategies is the need for calibrated policies to stimulate job creation and to maximize the job content of investment, both quantitatively and qualitatively. This has become especially urgent in light of the cumulative employment losses during the global financial crisis, and the relatively low job content of economic growth since, leading to a global employment deficit estimated at over 200 million workers.[6]

Harnessing investment for productive capacity building and enhancing international competitiveness

The potential contribution of foreign investment to building or reinforcing local productive capacities should guide investment policy and targeting efforts. This is particularly important where investment is intended to play a central role in industrial upgrading and structural transformation in developing economies. The most crucial aspects of productive capacity building include human resources and skills development, technology and know-how, infrastructure development, and enterprise development.

Foreign investment can reinforce local productive capacities through human resources and skills development, technology and know-how dissemination, infrastructure and enterprise development

Human resources and skills. Human resources development is a crucial determinant of a country's long-term economic prospects. In addition, the availability of skilled, trainable and productive labour at competitive costs is a major magnet for efficiency-seeking foreign investors. As such, education and human resource development policy should be considered a key complement to investment policy. Particular care should be given to matching skills needs and skills development, including in terms of vocational and technical training. Vocational training that prepares trainees for jobs involving manual or practical activities related to a specific trade or occupation is a key policy tool, for instance, to enhance the capacity of local suppliers.

As economies develop, skills needs and job opportunities evolve, making a constant adaptation and upgrading of education and human development policies a necessity. The latter are essential not just to provide the necessary skills to investors, but more crucially to ensure that the population can gain access to decent work opportunities.

FDI – as well as NEMs – are particularly sensitive to the availability of local skills, which can frequently be a "make or break" factor in investment location decisions. Where local skills are partially lacking, foreign and national investors may wish to rely on expatriate workers to fill the gaps. Although particular care should be paid to promoting employment by nationals and to protecting national security, countries have a lot to gain from enabling investors to tap foreign skills readily and easily where needed. Well-crafted immigration and labour policies have had demonstrated benefits in countries that have allowed foreign skills to complement and fertilize those created locally. Knowledge spillovers also occur through international employees. An adequate degree of openness in granting work permits to skilled foreign workers is therefore important not only to facilitate investments that may otherwise not materialize for lack of skills, but also to support and complement the national human resource development policy through education.

Technology and know-how. An important policy task is to encourage the dissemination of technology. For example, governments can promote technology clusters that promote R&D in a particular industry and that can help upgrading industrial activities by bringing together technology firms, suppliers and research institutes. Disseminating and facilitating the acquisition of technology can also improve the involvement of domestic producers in GVCs (e.g. call centers, business processing operations or contract farming).

Appropriate protection of intellectual property rights is an important policy tool because it is often a precondition for international investors to disclose technology to licensees in developing countries, especially in areas involving easily imitable technologies (e.g. software, pharmaceuticals), and hence can affect chances of attracting equity investments (e.g. joint ventures) or non-equity modes of involvement (e.g. licensing). At the same time the level of protection should be commensurate with the level of a country's development and conducive to the development of its technological capacities. It can be a means of encouraging independent research activities by local companies, because businesses are more likely to invest resources in R&D and technological upgrading if their innovations are protected.

Infrastructure. The development of domestic infrastructure may necessitate investments of such magnitude that it is impossible for domestic companies to undertake them alone. Infrastructure development may also require certain technological skills and know-how, which domestic firms do not have (e.g. telecommunication, energy, exploration of natural resources in remote areas). Likewise, the move to a low-carbon economy will often necessitate bringing in the technological capacities of foreign investors.

Most developing countries, especially LDCs, continue to suffer from vast deficiencies in infrastructure, in particular electricity, water and transport, and to a lesser extent telecommunications. Following technological progress and changes in regulatory attitudes, many countries have succeeded in introducing private (foreign) investment and competition in what used to be public sector monopolies, e.g. mobile telecommunications or power generation.

Given the potential contribution of FDI to building high-quality infrastructure, countries should consider the extent to which certain sectors or sub-sectors could be opened to (foreign) private investment, and under what conditions – balancing considerations of public service provision, affordability and accessibility. National security-related concerns with regard to the liberalization of critical infrastructure can be taken care of by screening procedures. A clear vision of what is doable and desirable socially, technically and from a business perspective is essential given the dependence of economic growth on infrastructure development.

FDI can make a significant contribution to building high-quality infrastructure – a priority area for investment in sustainable development

All too many developing countries have attempted to privatize infrastructure or public services only to fail or achieve less than optimal outcomes.[7] Governments need to develop not only a clear assessment of what can be achieved and at what costs, but also a comprehensive understanding of the complex technicalities involved in infrastructure investments and their long-term implications in terms of cost, quality, availability and affordability of services. A sound legal framework to guide concessions, management contracts and all forms of public-private partnerships is a key piece in the infrastructure development and investment strategies (*WIR08*).

Enterprise development. Domestic enterprise development is a key transfer mechanism for the development benefits of investment to materialize. At the same time, especially for foreign investors, the presence of viable local enterprise is a crucial determinant for further investment and for partnerships in NEMs. A comprehensive discussion of policy options to foster domestic entrepreneurial development – including

in areas such as the regulatory environment, access to finance, education and training, and technological development – can be found in UNCTAD's Entrepreneurship Policy Framework (box 5).

Enterprise development policies aimed at enhancing the benefits from investment focus on building capacity to absorb and adapt technology and know-how, to cooperate with multinational firms, and to compete internationally.

Another important policy task is the promotion of linkages and spillover effects between foreign investment and domestic enterprises (*WIR01*). Policy coordination is needed to ensure that investment promotion is targeted to those industries that could have the biggest impact in terms of creating backward and forward linkages and contribute not just to direct, but also to indirect employment creation. At the same time, policymakers in developing countries need to address the risk of foreign investment impeding domestic enterprise development by crowding out local firms, especially SMEs. Industrial policies may play a role in protecting infant industries or other sensitive industries with respect to which host countries see a need to limit foreign access.

In the long run, enterprise development is essential for host countries to improve international competitiveness. Promotion efforts should therefore not be limited to low value-added activities within global value chains, but gradually seek to move to higher-value added segments. This is crucial for remaining competitive once developing countries lose their low labour cost advantage. However, switching from labour-intensive low-value activities to more capital-intensive higher value production methods may raise unemployment in the transition phase and thus calls for vigilant labour market and social policies. This confirms the important dynamic dimension of investment and enterprise development strategies, calling for regular reviews and adaptation of policy instruments (*WIR13*).

Ensuring coherence between investment policies and other policy areas geared towards overall development objectives

The interaction between investment policy and other elements of a country's overall economic development and growth strategy – including human resource development, infrastructure, technology, enterprise development, and others – is complex. It is critical that government authorities work coherently towards the common national objective of sustainable development and inclusive growth, and seek to create synergies. This requires coordination at the earliest stages of policy design, as well as the involvement of relevant stakeholders, including the investor community and civil society.

Box 5. UNCTAD's Entrepreneurship Policy Framework

Entrepreneurship is vital for economic growth and development. The creation of new business entities generates value added, fiscal revenues, employment and innovation, and is an essential ingredient for the development of a vibrant small- and medium-sized business sector. It has the potential to contribute to specific sustainable development objectives, such as the employment of women, young people or disadvantaged groups. Entrepreneurship development can also contribute to structural transformation and building new industries, including the development of eco-friendly economic activities.

UNCTAD's Entrepreneurship Policy Framework (EPF) aims to support developing-country policymakers in the design of initiatives, measures and institutions to promote entrepreneurship. It sets out a structured framework of relevant policy areas, embedded in an overall entrepreneurship strategy, which helps guide policymakers through the process of creating an environment that facilitates the emergence start-ups, as well as the growth and expansion of new enterprises.

The EPF recognizes that in designing entrepreneurship policy "one size does not fit all". Although the national economic and social context and the specific development challenges faced by a country will largely determine the overall approach to entrepreneurship development, UNCTAD has identified six priority areas that have a direct impact on entrepreneurial activity (box figure 1). In each area the EPF suggests policy options and recommended actions.

Box figure 1. Key components of UNCTAD's Entrepreneurship Policy Framework

The EPF further proposes checklists and numerous references in the form of good practices and case studies. The case studies are intended to equip policy makers with implementable options to create the most conducive and supportive environment for entrepreneurs. The EPF includes a user guide, a step-by-step approach to developing entrepreneurship policy, and contains a set of indicators that can measure progress. An on-line inventory of good practices in entrepreneurship development, available on UNCTAD's web-site, completes the EPF. This online inventory will provide an opportunity for all stakeholders to contribute cases, examples, comments and suggestions, as a basis for the inclusive development of future entrepreneurship policies.

Source: UNCTAD; www.unctad.org/diae/epf.

2. DESIGNING POLICIES FOR RESPONSIBLE INVESTMENT AND SUSTAINABLE DEVELOPMENT

From a development perspective, FDI is more than a flow of capital that can stimulate economic growth. It comprises a package of assets that includes long-term capital, technology, market access, skills and know-how (*WIR99*). As such, it can contribute to sustainable development by providing financial resources where such resources are often scarce; generating employment (*WIR94*); strengthening export capacities (*WIR02*); transferring skills and disseminating technology; adding to GDP through investment and value added, both directly and indirectly; and generating fiscal revenues (*WIR15*). In addition, FDI can support industrial diversification and upgrading, or the upgrading of agricultural productivity (*WIR09*) and the build up of productive capacity, including infrastructure (*WIR08*). Importantly, it can contribute to local enterprise development through linkages with suppliers (WIR01) and by providing access to GVCs (*WIR13*) – the growing importance of GVCs can have an important pro-poor dynamic to the extent that marginalized communities and small suppliers can integrate into global or regional value chains as producers, suppliers or providers of goods and services.

These positive development impacts of FDI do not always materialize automatically. And the effect of FDI can also be negative in each of the impact areas listed above. For example, it can lead to outflows of financial resources in the form of repatriated earnings or fees; it can, under certain circumstances, crowd out domestic investment and domestic enterprise (*WIR97*); it can at times reduce employment by introducing more efficient work practices or through restructurings (*WIR94*, *WIR00*), or jobs created may be unstable due to the footloose nature of some investment types; it can increase imports more than exports (or yield limited net export gains), e.g. in case of investment operations requiring intermediate inputs or for market-seeking investments (*WIR02*, *WIR11*); technology dissemination might not take place, or only at high cost (e.g. through licensing fees) (*WIR11*), and local technological development may be slowed down; skills transfers may be limited by the nature of jobs created; fiscal gains may be limited by tax avoidance schemes available to international investors, including transfer pricing; and so forth.

Fostering sustainable development through FDI requires a balance between investment promotion and regulation

The balance of potential positive and negative development contributions of FDI is proof that investment policy matters in order to maximize the positive and minimize the negative impacts. Reaping the development benefits from investment requires not only an enabling policy framework that combines elements of investment promotion and regulation and that provides clear, unequivocal and transparent rules for the entry and operation of foreign investors (see box 6), it also requires adequate regulation to minimize any risks associated with investment.

The host of different impact types listed above indicates that such regulations need to cover a broad range of policy areas beyond investment policies per se, such as trade, taxation, intellectual property, competition, labour market regulation, environmental policies, social issues and access to land. The coverage of such a multitude of different policy areas confirms the need for consistency and coherence in policymaking across government.

Fostering sustainable development and inclusive growth through investment requires a balance of promotion and regulation. On the promotion side, attracting low-carbon investment, for example, may imply the need to set up new policy frameworks for a nascent renewable energy sector, which may also require government assistance in the start-up phase, be it through tax incentives or measures aimed at creating a market (*WIR10*). Encouraging investment in sectors that are crucial for the poor may imply building sound regulatory frameworks and facilitation of responsible investment in agriculture (including contract farming), as agriculture continues to be the main source of income in many developing countries (*WIR09*).

At the same time, on the regulatory side, sustainability should be a key consideration when deciding on the granting of investment incentives. The short-term advantages of an investment need to be weighed against the potential long-term environmental effects. The sensitive issue of access to land requires careful balancing of the rights and obligation of agricultural investors. And there is a need to ensure the accessibility and affordability of infrastructure services (e.g. access to energy) when such services are opened for private investment. For many developing countries, it is a key challenge to strengthen such environmental and social protection while maintaining an attractive investment climate.

Sustainability issues should also be a main consideration in investment contracts between the host country and individual investors. Such contracts can be a means to commit investors to environmental or social standards beyond the level established by the host country's general legislation, taking into account international standards and best practices.

Box 6. Designing sound investment rules and procedures: UNCTAD's Investment Facilitation Compact

UNCTAD's Investment Facilitation Compact combines a number of programs aimed at assisting developing countries in strengthening their policy and institutional framework for attracting and retaining foreign investment, and in developing a regulatory climate in which investors can thrive.

The *UNCTAD-ICC Investment Guides* aim to provide accurate and up-to-date information on regulatory conditions in participating countries as well as on the investment climate and emerging investment opportunities. The online versions (iGuides) provide locally-available data on costs and prices of factors of production; relevant rules and licensing requirements, timelines and useful contacts; and they relay the experiences of established investors. The web-based guides can be easily updated at any time to reflect changes in legislation, infrastructure, costs or taxes. They are prepared in collaboration with governments, national chambers of commerce and investors.

The guides aim to provide a reliable source of third-party information for investors looking to invest in countries that are rarely covered by commercial publishers. They highlight often under-reported economic and investment policy reform efforts, including fiscal incentives, regional integration, easier access to land, establishment of alternative dispute settlement mechanisms, simplified border procedures, facilitation of permits and licenses and laws enabling private investment in power generation and infrastructure. Because the guides are produced through a collaborative process they also build capacities of governments to promote investment opportunities and understand investors' needs.

UNCTAD's Business Facilitation program helps developing countries create an enabling business environment through transparency and simplification of procedures related to investment, business creation and operation. The program consists of three phases: a) procedures are clarified through an online eGovernment system called eRegulations. The system presents step-by-step procedures related to business or investment registration, licenses, construction permits, payment of taxes, obtaining work permits, trading across borders, etc. For each step, all forms, requirements, contact details of civil servants, costs and legal bases are detailed; b) procedures are simplified – often reducing the number of steps by more than 50% – within the existing regulatory framework, applying a set of 10 principles for the simplification of administrative procedures; c) once simplified, procedures are computerized on the basis of the eRegistrations system. Online single windows are created where businesses can apply simultaneously for all mandatory registrations through a unique user-friendly platform.

The program promotes good governance by increasing the awareness of administrative rules and procedures, establishing the conditions for a balanced dialogue between the users of the public services, including investors, and civil servants. It also sets a basis for regional or international harmonization of rules by facilitating the exchange of good practices among countries.

Individual programs within the Investment Facilitation Compact have to date been undertaken in more than 46 countries and regions, with a strong focus on LDCs (box table 1).

Box table 1. Beneficiaries of selected programs of UNCTAD's Investment Facilitation Compact

Categories	Countries/regions
Investment Guides	Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Comoros, Djibouti, East African Community, Ethiopia, Kenya, Lao PDR, Mali, Mauritania, Morocco, Mozambique, Nepal, Oriental Region of Morocco, Rwanda, Silk Road Region, Tanzania, Uganda, Uzbekistan, Zambia
Business Facilitation	Argentina, Benin, Bhutan, Burkina Faso, Cabo Verde, Cameroon, Colombia, Comoros, Congo Brazzaville, Costa Rica, Côte d'Ivoire, El Salvador, Ethiopia, Guatemala, Guinea Bissau, Honduras, Mali, Morocco, Nicaragua, Niger, Panama, Russian Federation (City of Moscow), Rwanda, Tanzania, Togo, Viet Nam

Source: UNCTAD; www.unctad.org; www.theiguides.org; businessfacilitation.org.

While laws and regulations are the basis of investor responsibility, voluntary CSR initiatives and standards have proliferated in recent years, and they are increasingly influencing corporate practices, behaviour and investment decisions. Governments can build on them to complement the regulatory framework and maximize the development benefits of investment (*WIR11*).

Because CSR initiatives and voluntary standards are a relatively new area that is developing quickly and in many directions, the management of their policy implications is a challenge for many developing countries. In particular, the potential interactions between soft law and hard law can be complex, and the value of standards difficult to extract for lack of monitoring capacity and limited comparability. A number of areas can benefit from the encouragement of CSR initiatives and the voluntary dissemination of standards; for example, they can be used to promote responsible investment and business behaviour (including the avoidance of corrupt business practices), and they can play an important role in promoting low-carbon and environmentally sound investment. Care needs to be taken to avoid these standards becoming undue barriers to trade and investment flows.

Impact measurement and reporting by private investors on their social and environmental performance promotes corporate responsibility on the ground and supports mobilization and channeling of investment. High quality sustainability reporting involves the generation of internal company data on sustainability related activities and control systems, facilitating proactive management, target setting and benchmarking. Publicly reported data can play an important role in enabling governments to monitor the effectiveness of policies and incentive structures, and often serve as a prerequisite for resource mobilization for investment in priority sectors for sustainable development.

The importance of sustainability reporting has been recognized throughout the process leading up the formation of the Sustainable Development Goals. In 2013, the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda proposed that "in future – at latest by 2030 – all large businesses should be reporting on their environmental and social impact – or explain why if they are not doing so." (United Nations, 2013:24).[8] In 2014, the European Parliament adopted a directive which will require the disclosure of environmental and social information by large public-interest companies (500+ employees). Individual UN member States around the world have also taken steps to promote sustainability reporting.[9] Apart from regulatory initiatives, some stock exchanges have implemented mandatory listing requirements in the area of sustainability reporting.[10]

The content and approach to the preparation of sustainability reports is influenced by a number of international initiatives actively promoting reporting practices, standards and frameworks. Recent examples of such initiatives include the Global Reporting Initiative (GRI)[11], the Carbon Disclosure Project (CDP)[12], the International Integrated Reporting Council (IIRC)[13], the Accounting for Sustainability (A4S)[14], and the Sustainability Accounting Standards Board (SASB).[15] UNCTAD has also been active in this area (box 7).

Box 7. UNCTAD Initiative on Sustainability Reporting

UNCTAD promotes best practice on sustainability rule making via the Sustainable Stock Exchanges initiative.[16] Member States endorsed the following recommendations as part of the UNCTAD Best Practice Guidance for Policy Makers and Stock Exchanges on Sustainability Reporting Initiatives (UNCTAD, 2014):

- Introducing voluntary sustainability reporting initiatives can be a practical option to allow companies time to develop the capacity to prepare high-quality sustainability reports;
- Sustainability reporting initiatives can also be introduced on a comply or explain basis, to establish a clear set of disclosure expectations while allowing for flexibility and avoiding an undue burden on enterprises;
- Stock exchanges and/or regulators may consider advising the market on the future direction of sustainability reporting rules. Companies should be allotted sufficient time to adapt, especially if stock exchanges or regulators are considering moving from a voluntary approach to a mandatory approach;
- Sustainability reporting initiatives should avoid creating reporting obligations for companies that may not have the capacity to meet them. Particularly in the case of mandatory disclosure initiatives, one option is to require only a subset of companies (e.g. large companies or State-owned companies) to disclose on sustainability issues;
- Stock exchanges and regulators may wish to consider highlighting sustainability issues in their existing definitions of what constitutes material information for the purposes of corporate reporting;
- With a view to promoting an internationally harmonized approach, stock exchanges and regulators may wish to consider basing sustainability reporting initiatives on an international reporting framework.
- Considerations for the design and implementation of sustainability reporting initiatives include using a multi-stakeholder consultation approach in the development process for creating widespread adoption and buy-in and creating incentives for compliance, including public recognition and investor engagement.

Source: UNCTAD.

3. IMPLEMENTATION AND INSTITUTIONAL MECHANISMS FOR POLICY EFFECTIVENESS

Investment policy calls for enforcement by impartial, competent and efficient public institutions. Periodic review of performance is necessary to assess investment policy effectiveness against objectives

Investment policy and regulations must be adequately enforced by impartial, competent and efficient public institutions, which is as important for policy effectiveness as policy design itself. Policies to address implementation issues should be an integral part of the investment strategy and should strive to achieve both integrity across government and regulatory institutions and a service orientation where warranted. As a widely accepted best-practice principle, regulatory agencies should be free of political pressure and have significant independence, subject to clear reporting guidelines and accountability to elected officials or representatives. These principles are particularly relevant for investors in institutions including courts and judiciary systems; sectoral regulators (e.g. electricity, transport, telecommunications, banking); customs; tax administration or revenue authority; investment promotion agency; and licensing bodies.

As stated in the third Core Principle, managing investment policy dynamically is of fundamental importance to ensure the continued relevance and effectiveness of policy measures. Revisions in investment policy may be driven by changes in strategy – itself caused by adaptations in the overall development strategy – or by external factors and changing circumstances. Countries require different investment policies at different stages of development, policies may need to take into account those in neighbouring countries, and be cognizant of trade patterns or evolving relative shares of sectors and industry in the economy. Policy design and implementation is a continuous process of fine-tuning and adaptation to changing needs and circumstances.

Beyond such adaptations, investment policy may also need adjustment where individual measures, entire policy areas, or the overall investment policy regime is deemed not to achieve the intended objectives, or to do so at a cost higher than intended. Understanding when this is the case, understanding it in time for corrective action to be taken, and understanding the reasons for the failure of measures to have the desired effect, is the essence of measuring policy effectiveness.

A significant body of academic literature exists on methodologies for evaluating policy effectiveness. Specifically in the area of investment policy, there are three objective difficulties associated with the measurement of policy effectiveness:

- It is often difficult to assess the effectiveness of discrete investment policy measures, such as the provision of incentives, let alone the effectiveness of the overall investment policy framework. Many *exogenous factors* and investment determinants beyond policy drive the investment attraction performance of a country – e.g. market size

and growth, the presence of natural resources, the quality of basic infrastructure, labour productivity, and many others (see UNCTAD's Investment Potential Index).

- Investment policy effectiveness measures should also provide an indication of the extent to which policies help realize the benefits from investment and maximize its development impact. However, it is often difficult to find solid evidence for the discrete impact on various dimensions of *investment*, let alone for the impact of the *policies* that led to that investment or that guide the behaviour of investors.
- Much of the impact of investment policies and thus their effectiveness depends on the way such policies are applied, and on the capabilities of institutions charged with *the implementation and enforcement of policies and measures*, rules and regulations.

Given these objective difficulties in measuring the effectiveness of investment policies, and to ensure that potentially important policy changes are not delayed by complex analyses of the impact of individual measures, policymakers may be guided by a few simplifying rules in evaluating the effectiveness of their policies:

Investment policy should be based on a set of explicitly formulated policy objectives with clear priorities, a time frame for achieving them, and the principal measures intended to support the objectives. These objectives should be the principal yardstick for measuring policy effectiveness.

The detailed quantitative (and therefore complex) measurement of the effectiveness of individual policy measures should focus principally on those measures that are most costly to implement, such as investment incentives.

Assessment of progress in policy implementation and verification of the application of rules and regulations at all administrative levels is at least as important as the measurement of policy effectiveness. A review process should be put in place to ensure that policies are correctly implemented as a part of the assessment of policy effectiveness.

Goals and objectives for investment policy, as set out in a formal investment strategy in many countries, should be SMART:[17]

Specific: they should break down objectives for investment attraction and impact for priority industries or activities as identified in the development strategy.

Measurable: investment goals and objectives should identify a focused set of quantifiable indicators.

Attainable: as part of investment policy development, policymakers should compare investment attraction and investment impact with peer countries to inform realistic target setting.

Relevant: objectives (and relevant indicators) should relate to impacts that can be ascribed to investment (and by implication investment policy), to the greatest extent possible filtered for "general development strategy" impacts.

Time-bound: objectives should fall within a variety of time frames. Even though broad development and investment-related objectives are of a long-term nature (e.g. 10-20 years), intermediate and specific objectives should refer to managerially and politically relevant time frames, e.g. 3-4 years. In addition, short-term benchmarks should be set within shorter time periods (a few quarters or a year) to ensure effective progress and implementation.

Objectives of investment policy should ideally include a number of quantifiable goals for both the *attraction of investment* and the *impact of investment*. To measure policy effectiveness for the attraction of investment, UNCTAD's Investment Potential and Performance Matrix can be a useful tool. This matrix compares countries with their peers, plotting investment inflows against potential based on a standardized set of economic determinants, thereby providing a proxy for the effect of policy determinants.

Similarly, for the measurement of policy effectiveness in terms of impact, UNCTAD's Investment Contribution Index may be a starting point. Also important is the choice of impact indicators. Policymakers should use a focused set of key indicators that are the most direct expression of the core development contributions of private investments, including direct contributions to GDP growth through additional value added, capital formation and export generation; entrepreneurial development and development of the formal sector and tax base; and job creation. The indicators could also address labour, social, environmental and development sustainability aspects.

The impact indicator methodology developed for the G-20 Development Working Group by UNCTAD, in collaboration with other agencies, may provide guidance to policymakers on the choice of indicators of investment impact and, by extension, of investment policy effectiveness (see table 4).

Table 4. Possible indicators for the definition of investment impact objectives and the measurement of policy effectiveness

Area	Indicators	Details and examples
Economic Value Added	1. Total value added	• Gross output (GDP contribution) of the new/additional economic activity resulting from the investment (direct and induced)
	2. Value of capital formation	• Contribution to gross fixed capital formation
	3. Total and net export generation	• Total export generation; net export generation (net of imports) is also captured by the value added indicator
	4. Number of formal business entities	• Number of businesses in the value chain supported by the investment; this is a proxy for entrepreneurial development and expansion of the formal (tax-paying) economy
	5. Total fiscal revenues	• Total fiscal take from the economic activity resulting from the investment, through all forms of taxation
Job creation	6. Employment (number)	• Total number of jobs generated by the investment, both direct and induced (value chain view), dependent and self-employed
	7. Wages	• Total household income generated, direct and induced
	8. Typologies of employee skill levels	• Number of jobs generated, by ILO job type, as a proxy for job quality and technology levels (including technology dissemination)
Sustainable development	9. Labour impact indicators	• Employment of women (and comparable pay) and of disadvantaged groups • Skills upgrading, training provided • Health and safety effects, occupational injuries
	10. Social impact indicators	• Number of families lifted out of poverty, wages above subsistence level • Expansion of goods and services offered, access to and affordability of basic goods and services
	11. Environmental impact indicators	• GHG emissions, carbon offset/credits, carbon credit revenues • Energy and water consumption/efficiency hazardous materials • Enterprise development in eco-sectors
	12. Development impact indicators	• Development of local resources • Technology dissemination

Source: "Indicators for measuring and maximizing economic value added and job creation arising from private sector investment in value chains", Report to the G-20 Cannes Summit, November 2011; produced by an inter-agency working group coordinated by UNCTAD.UNCTAD has included this methodology in its technical assistance work on investment policy, see box 4.

The indicator framework, which has been tested in a number of developing countries, is meant to serve as a tool that countries can adapt and adopt in accordance with their national economic development priorities and strategies. At early stages of development, pure GDP contribution and job creation impacts may be more relevant; at more advanced stages, quality of employment and technology contributions may gain relevance.

4. THE NATIONAL POLICY GUIDELINES

The national investment policy guidelines are organized in four sections, starting from the strategic level, which aims to ensure integration of investment policy in overall development strategy, moving to investment policy "stricto sensu", to investment-related policy areas such as trade, taxation, labour and environmental regulations, and intellectual property policies, to conclude with a section on investment policy effectiveness (table 5).

While the national guidelines in the policy framework are meant to establish a generally applicable setting for investment-related policymaking, it cannot provide a "one-size-fits-all" solution for all economies. Countries have different development strategies and any policy guide must acknowledge these divergences. Governments may have different perceptions about which industries to promote and in what manner, and what role foreign investors should play in this context.

The guidelines should be adapted and fine-tuned based on the specific economic context and development issues faced by each individual country

Table 5. Structure of the National Investment Policy Guidelines

Investment and sustainable development strategy	• Integrating investment policy in sustainable development strategy • Maximizing the contribution of investment to productive capacity building and international competitiveness

Investment regulation and promotion	• Designing investment-specific policies regarding:
	  • Establishment and operations
	  • Treatment and protection of investments
	  • Investor responsibilities
	  • Investment promotion and facilitation

Investment-related policy areas	• Ensuring coherence with other policy areas, including: trade, taxation, intellectual property, competition, labour market regulation, access to land, corporate responsibility and governance, environmental protection, infrastructure and PPPs
Investment policy effectiveness	• Building effective public institutions to implement investment policy • Measuring investment policy effectiveness and feeding back lessons learned into new rounds of policymaking

Social, cultural, geographical and historical differences play a role as well. Furthermore, the investment climate of each country has its individual strengths and weaknesses; therefore, policies aimed at building upon existing strengths and reducing perceived deficiencies will differ. Thus investment policies need to be fine-tuned based on specific economic contexts, sectoral investment priorities and development issues faced by individual countries. The national investment policy guidelines establish a basic framework. Other tools are available to complement the basic framework with customized best practice advice (box 8).

Box 8. Investment policy advice to "adapt and adopt": UNCTAD's Series on Best Practices in Investment for Development

As with UNCTAD's IPR approach (see box 4), in which each IPR is custom-designed for relevance in the specific context of individual countries, the UNCTAD work program on Best Practices in Investment for Development acknowledges that *one size does not fit all*.

The program consists of a series of studies on investment policies tailored to:

- specific sectors of the economy (e.g. infrastructure, natural resources,…);
- specific development situations (e.g. small economies, post-conflict economies,…);
- specific development issues (e.g. capacity building, linkages,…).

The program aims to build an inventory of best policy practices in order to provide a reference framework for policy makers in developing countries through concrete examples that can be adapted to their national context. Each study therefore looks at one or two specific country case studies from which lessons can be drawn on good investment policy practices related to the theme of the study. The following studies are currently available:

- How to Utilize FDI to Improve Transport Infrastructure: Roads – Lessons from Australia and Peru;
- How to utilize FDI to Improve Transport Infrastructure: Ports – Lessons from Nigeria;
- How to Utilize FDI to Improve Infrastructure: Electricity – Lessons from Chile and New Zealand;
- How to Attract and Benefit from FDI in Mining – Lessons from Canada and Chile;
- How to Attract and Benefit from FDI in Small Countries – Lessons from Estonia and Jamaica;
- How Post-Conflict Countries can Attract and Benefit from FDI – Lessons from Croatia and Mozambique;
- How to Integrate FDI and Skill Development – Lessons from Canada and Singapore;
- How to Create and Benefit from FDI-SME Linkages – Lessons from Malaysia and Singapore;
- How to Prevent and Manage Investor-State Disputes – Lessons from Peru.

Source: UNCTAD; www.unctad.org.

UNCTAD Investment Policy Framework for Sustainable Development

NATIONAL INVESTMENT POLICY GUIDELINES

Sections	Sub-sections	Policy Guidelines
1 Investment and sustainable development strategy	**1.1 Strategic investment policy priorities**	1.1.1 Investment policy should be geared towards the realization of national sustainable development goals (which may be linked to globally defined sustainable development goals, or SDGs) and grounded in a country's overall development strategy. It should set out strategic priorities, including: • Investment in specific economic activities, e.g. as an integral part of an industrial development strategy, *or in specific priority sectors for sustainable development ("sustainable-development sectors").* • Areas for mutual reinforcement of public and private investment (including a framework for public-private partnerships). • Investment that makes a significant development contribution by creating decent work opportunities, enhancing sustainability, and/or by expanding and qualitatively improving productive capacity (see 1.2) and international competitiveness. Investment policy priorities should be based on a thorough analysis of the country's competitive advantages and development challenges and opportunities, and should address key bottlenecks for attracting FDI.
		1.1.2 Strategic investment policy priorities may be effectively formalized in a published document (e.g. investment strategy), making explicit the intended role of private and foreign investment in the country's sustainable development strategy and development priorities, and providing a clear signal to both investors and stakeholders involved in investment policymaking. *Achievable, but ambitious target levels of sustainable development investment are desirable.*
	1.2 Investment policy coherence for productive capacity building	
	Human resource development	1.2.1 The potential for job creation and skills transfer should be one of the criteria for determining investment priorities. Taking into account the mutually reinforcing link between human resource development (HRD) and investment, investment policy should inform HRD policy to prioritize skill building in areas crucial for development priorities, whether technical, vocational, managerial or entrepreneurial skills.
	Technology and know-how	1.2.2 The potential for the transfer, dissemination and adaptation of appropriate technologies and the dissemination of know-how should be one of the criteria for determining investment priorities, and should be promoted through adequate investment-related policies, including taxation and intellectual property. Where investment priorities are driven by the objective to increase participation in and benefits from global value chains (GVCs), technology and skill requirements along GVC development paths, as well as upgrading opportunities, should inform policy.

Sections	Sub-sections	Policy Guidelines
Investment and sustainable development strategy (continued)	Infrastructure	1.2.3 The potential for infrastructure development through FDI, in particular under PPPs or other risk-sharing arrangements, should be an integral part of investment policy. Infrastructure development policies should give due consideration to basic infrastructure areas crucial for the building of productive capacities, including utilities, (rail-) roads, sea- and airports or industrial parks, as well as other sustainable-development sectors, in line with investment priorities. Strong governance and oversight should be exercised in essential infrastructure industries and sectors of a public service nature (see also section 3.9 below).
		1.2.4 A specific regulatory framework for PPPs should be in place to ensure that investor-State partnerships serve the public interest (see also section 3.9 below).
	Enterprise development	1.2.5 The potential for FDI to generate business linkages and to stimulate local enterprise development should be a key criterion in defining investment policy and priorities for FDI attraction. Enterprise development and business facilitation policies (including access to finance) should promote entrepreneurial activity where such activity yields particularly significant benefits through linkages and acts as a crucial locational determinant for targeted foreign investments. These policies are especially important where investment takes place in the context of GVCs, as increasing domestic value added in trade and associated upgrading opportunities rely on the development of a local supplier base.
2 Investment regulation and promotion	**2.1 Entry, establishment and operations of foreign investors**	
	Policy statement on FDI and degree of openness	2.1.1 Investment policy benefits from a clear message towards the international business community on FDI (e.g. in a country's Investment Strategy or law on foreign investment, where these exist). Attracting high levels of diverse and beneficial FDI calls for a general policy of openness and avoidance of investment protectionism, subject to qualifications and selective restrictions to address country-specific development needs and policy concerns, such as regarding the provision of public goods or the control over strategic industries and critical infrastructure.
	Screening and entry restrictions	2.1.2 Ownership restrictions or limitations on the entry of foreign investment, in full accordance with countries' right to regulate, should be justified by legitimate national policy objectives and should not be influenced by special interests. They are best limited to a few explicitly stated aims, including: • protecting the national interest, national security, control over natural resources, critical infrastructure, public health, the environment; or • promoting national development objectives in accordance with a published development strategy or investment strategy. Such restrictions need to be in conformity with international commitments.
		2.1.3 Restrictions on foreign ownership in specific industries or economic activities should be clearly specified; a list of specific industries where restrictions (e.g. prohibitions, limitations) apply has the advantage of achieving such clarity while preserving a policy of general openness to FDI.

Sections	Sub-sections	Policy Guidelines
Investment regulation and promotion (continued)		2.1.4 A periodic review should take place of any ownership restrictions and of the level of ownership caps to evaluate whether they remain the most appropriate and cost-effective method to ensure these objectives.
		2.1.5 Screening procedures for investment entry and establishment, where applicable, should be conducted following pre-established objective criteria.
	Property registration	2.1.6 Investors should be able to register ownership of or titles to land and other forms of property securely, effectively and timely, including in order to facilitate access to debt finance, bearing in mind specific development challenges in this regard (see also 3.6 below).
	Freedom of operations	2.1.7 Governments should avoid direct and indirect intrusions in business management and respect the freedom of operations of private companies, subject to compliance with domestic laws. This includes the freedom of investors to decide whether they want to invest at home or abroad.
	Performance requirements	2.1.8 Performance requirements and related operational constraints should be used sparingly and only to the extent that they are necessary to achieve legitimate public policy purposes. They need to be in compliance with international obligations and would typically be imposed principally as conditions for special privileges, including fiscal and financial incentives, or in special investment circumstances (e.g. concessioning, privatizations, public procurement).
	2.2 Treatment and protection of investors	
	Treatment under the rule of law	2.2.1 Established investors and investments, foreign or domestic, should be granted treatment that is based on the rule of law.
	Core standards of treatment	2.2.2 As a general principle, foreign investors and investments should not be discriminated against vis-à-vis national investors in the post-establishment phase and in the conduct of their business operations. Where development objectives require policies that distinguish between foreign and domestic investment, these should be limited, transparent and periodically reviewed for efficacy against those objectives. They need to be in line with international commitments, including commitments as a REIO member.
		2.2.3 While recognizing that countries have not only the *right* but the *duty* to regulate, the need for regulatory change should be weighed against the need to maintain a level of stability and predictability of the investment climate.
	Transfer of funds	2.2.4 Where the level of development or macro-economic considerations warrant restrictions on the transfer of capital, countries should seek to treat FDI-related transactions differently from other (particularly short-term) capital account transactions. Countries should guarantee the freedom to transfer and repatriate capital related to investments in productive assets, subject to reporting requirements (including to fight money laundering) and prior compliance with tax obligations, and subject to potential temporary restrictions due to balance of payment crises and in compliance with international law. Controls should be periodically reviewed for efficacy.

Sections	Sub-sections	Policy Guidelines
Investment regulation and promotion (continued)		2.2.5 Countries should guarantee the free convertibility of their currency for current account transactions, including FDI-related earnings and dividends, interests, royalties and others. Any restriction to convertibility for current account transactions should be in accordance with existing international obligations and flexibilities, in particular the IMF Articles of Agreement.
	Contract enforcement and dispute settlement	2.2.6 All investors should be entitled to equal treatment in the enforcement of contracts. Mechanisms and proceedings for the enforcement of contracts should be transparent, objective, efficient and effective, and available to all investors so as to duly operate under the rule of law.
	Investment contracts	2.2.7 States should honour their obligations deriving from investment contracts with investors, unless they can invoke a fundamental change of circumstances or other legitimate reasons in accordance with national and international law.
	Expropriation	2.2.8 When warranted for legitimate public policy purposes, expropriations or nationalization should be undertaken in a non-discriminatory manner and conform to the principle of due process of law, and compensation should be provided. Decisions should be open to recourse and reviews to avoid arbitrariness.
	International commitments	2.2.9 Government should assign explicit responsibility and accountability for the implementation and periodic review of measures to ensure effective compliance with commitments under IIAs. Strong alternative dispute resolution (ADR) mechanisms can be effective means to avoid international arbitration of disputes.
	2.3 Investor obligations	
	Responsible investment	2.3.1 Investors' first and foremost obligation is to comply with a host country's laws and regulations. This obligation should apply and be enforced indiscriminately to national and foreign investors, as should sanctions for non-compliance. Investor responsibility includes the payment of taxes due in accordance with the letter and the spirit of the law.
	Standards	2.3.2 Governments should encourage adherence to international standards of responsible investment and codes of conduct by foreign investors. Standards which may serve as reference include the ILO Tripartite Declaration, the OECD Guidelines for Multinational Enterprises, the UNCTAD, FAO IFAD and World Bank Principles for Responsible Agriculture Investment, the UN Guiding Principles on Business and Human Rights and others. In addition, countries may wish to translate soft rules into national legislation.
	2.4 Promotion and facilitation of investment	
	Investment authority, investment promotion agency (IPA) and/or investment development agency	2.4.1 Explicit responsibility and accountability should be assigned to an investment promotion agency (IPA) to encourage investment and to assist investors in complying with administrative and procedural requirements with a view towards facilitating their establishment, operation and development.
		2.4.2 The mission, objectives and structure of the IPA should be grounded in national investment policy objectives and regularly reviewed. The core functions of IPAs should include image building, targeting, facilitation, aftercare and advocacy.

Sections	Sub-sections	Policy Guidelines
Investment regulation and promotion (continued)		2.4.3 Especially where promoting and facilitating investment in sustainable-development sectors is a priority, IPAs may evolve into ("next generation") investment development agencies, defining and marketing bankable investment projects (that are politically supported, regulatory prepared and pre-packaged), in addition to traditional IPA functions.
		2.4.4 As the prime interface between Government and investors, IPAs should support efforts to improve the general business climate and eliminate red tape. Promoting transparency and simplification of administrative procedures for business and investors is a key role for IPAs. UNCTAD's 10 Principles for Simple Administrative Procedures can provide guidance; see BusinessFacilitation.org).
		2.4.5 Where screening or preliminary approval are imposed on foreign investors, responsibility and accountability for such procedures should be clearly separate from investment promotion and facilitation functions in order to avoid potential conflicts of interest.
		2.4.6 IPAs should be in a position to resolve cross-ministerial issues through its formal and informal channels of communication, and by reporting at a sufficiently high level of Government. Its governance should be ensured through an operational board that includes members from relevant ministries as well from the private sector.
		2.4.7 The effectiveness of the IPA in attracting investment should be periodically reviewed against investment policy objectives. The efficiency of the IPA and its working methods should also be reviewed in light of international best practice.
		2.4.8 The work of national and sub-national IPAs, as well as that of authorities promoting investment in special economic zones, should be closely coordinated to ensure maximum efficiency and effectiveness.
		2.4.9 Being at the core of Government efforts to promote and facilitate investment, the IPA should establish close working relationships (including through secondment of staff) with regulatory agencies dealing directly with investors. It should seek to promote a client-oriented attitude in public administration. It may enlist the diplomatic service to strengthen overseas promotion efforts.
		2.4.10 The intense trade and investment links, particularly in GVCs, call for close coordination between domestic trade and investment promotion agencies. Countries' objectives for GVC participation and positioning should be included among the criteria to determine the institutional set-up for trade and investment promotion (separate or combined agencies).
		2.4.11 Cooperation between outward investment agencies in home countries and IPAs in host countries can be institutionalized for the purpose of marketing sustainable development investment opportunities, provision of incentives and facilitation services for sustainable development projects, and joint monitoring and impact assessment.
	Investment incentives and guarantees	2.4.12 Investment incentives, in any form (fiscal, financial or other), should be carefully assessed in terms of long-term costs and benefits prior to implementation, giving due consideration to potential distortion effects. The costs and benefits of incentives should be periodically reviewed and their effectiveness in achieving the desired objectives thoroughly evaluated.
		2.4.13 Where investment incentives are granted to support nascent industries, self-sustained viability (i.e. without the need for incentives) should be the ultimate goal so as to avoid subsidizing non-viable industries at the expense of the economy as a whole. A phase-out period built in the incentive structure is good practice, without precluding permanent tax measures to address positive or negative externalities.

Sections	Sub-sections	Policy Guidelines
Investment regulation and promotion (continued)		2.4.14 The rationale and justification for investment incentives should be directly and explicitly derived from the country's development strategy. Their effectiveness and suitability for stated objectives should be fully assessed before adoption, including through international comparability.
		2.4.15 Investment incentives should ideally be targeted at investment in sustainable-development sectors and made conditional on social and environmental performance (see section 1.1).
		2.4.16 The administration of incentives should be the responsibility of an independent entity or ministry that does not have conflicting objectives or performance targets for investment attraction. The ultimate responsibility for financial outlays associated with incentives should be with the Ministry of Finance, and integrated in the normal budgeting process).
		2.4.17 Environmental, labour and other regulatory standards should not be lowered as a means to attract investment, or to compete for investment in a "regulatory race to the bottom".
		2.4.18 Investment incentives should be granted on the basis of a set of pre-determined, objective, clear and transparent criteria. They should be offered on a non-discriminatory basis to projects fulfilling these criteria. Compliance with the criteria (performance requirements) should be monitored on a regular basis as a condition to benefit from the incentives.
		2.4.19 Investment incentives over and above pre-defined incentives must be shown to make an exceptional contribution to development objectives, and additional requirements should be attached, including with a view to avoiding a "race to the top of incentives".
		2.4.20 Investment incentives offered by sub-national entities which have the discretion to grant incentives over and above the pre-defined limits, should be coordinated by a central investment authority to avoid investors "shopping around".
	Promotion of business linkages and spillovers	2.4.21 As business linkages between foreign investors and national companies do not always develop naturally, Governments and IPAs should actively nurture and facilitate them. Undue intrusion in business partnerships should be avoided as mutually beneficial and sustainable linkages cannot be mandated.
		2.4.22 Priorities in promoting business linkages should be established based on economic impact and on countries' positioning on the GVC development path and upgrading opportunities, as development of a local supplier base is instrumental to gain access to GVCs, increase participation, and improve domestic value added in trade.
		2.4.23 Measures that Governments should consider to promote linkages include: (1) direct intermediation between national and foreign investors to close information gaps; (2) support (financial and other) to national companies for process or technology upgrading; (3) selective FDI targeting; (4) establishment of national norms and standards, in line with international (e.g ISO) standards; and (5) incentives for foreign investors to assist in upgrading of local SMEs and promotion of entrepreneurship.
		2.4.24 Governments should specifically consider measures to improve access to finance for SMEs and entrepreneurs with the potential to supply foreign investors, e.g. through guarantee schemes; encouragement of supplier finance programmes; banking sector development programmes; and programmes that build the financial skills of entrepreneurs and SMEs (see UNCTAD's Entrepreneurship Policy Framework, or EPF).

Sections	Sub-sections	Policy Guidelines
		2.4.25 Practices to promote linkages based on mandatory requirements of foreign investors, such as joint-venture requirements, should be used sparingly and carefully considered to avoid unintended adverse effects.
		2.4.26 Explicit responsibility and accountability should be assigned to the investment authority or IPA to nurture and promote business linkages established by foreign investors as part of its aftercare mandate.
		2.4.27 Specific policies should encourage businesses to offer training to employees in skill areas deemed crucial in the country's policy on human resource development, including through performance requirements linked to investment incentives.
3 Investment-related policies	3.1 Trade policy	
	International trade agreements	3.1.1 Access to global markets is essential for resource- and efficiency-seeking foreign investors, and the size of local/regional markets is equally important for market-seeking investors. Active participation in international trade agreements (in particular the WTO) and enhanced integration at the regional level should be considered an integral part of development strategy and a key factor in promoting investment.
Investment-related policies (continued)		3.1.2 Synergies should be sought through integrated treatment of international investment and trade agreements. Regional trade and investment agreements are particularly relevant from a value chain perspective, as regional liberalization efforts are shaping regional value chains and the distribution of value added. These agreements could evolve into "regional investment compacts" founded on extended regional cooperation between Governments, trade and investment promotion agencies, and international organizations with the aim of promoting development through increased harmonization of trade and investment regulations and regional cross-border infrastructure and industrial development.
	Trade restriction and promotion	3.1.3 Trade policies, including tariffs and non-tariff barriers, and trade promotion/facilitation measures (e.g. export finance, import insurance schemes, support to obtain compliance with international standards and norms) can selectively promote or discourage investment in specific industries. They should be defined in line with (industrial) development objectives and investment policy.
		3.1.4 Governments should ensure coherence between trade policy measures and investment policy measures as these policies can have unintended counterproductive effects (i.e. trade measures affecting investment and investment measures affecting trade).
	Customs and border procedures	3.1.5 Compliance costs and efficiency of border procedures should be periodically benchmarked against international best practice and should avoid as much as possible forming an obstacle to the attraction of export-oriented investment or investment that relies on imports of intermediate goods.
	3.2 Tax policy	
	Corporate taxation	3.2.1 A periodic review, including international benchmarking, of corporate taxation (and fiscal incentives) for effectiveness, costs and benefits should be an integral part of investment policy. Reviews should consider costs linked to the structure of the tax regime, including (1) administrative and compliance costs for investors, (2) administrative and monitoring costs for the tax authorities, and (3) forgone revenue linked to aggressive tax planning.

Sections	Sub-sections	Policy Guidelines
Investment-related policies (continued)		3.2.2 Undue complexity of income tax law and regulations should be avoided and they should be accompanied by clear guidelines, as transparency, predictability and impartiality of the tax regime are essential for all investors, foreign and national alike.
		3.2.3 The tax system should tend to neutrality in its treatment of domestic and foreign investors.
		3.2.4 An increasing role for foreign investment in national economies requires increased technical capabilities on the part of tax authorities to manage international taxation and transfer pricing issues. An assessment of collection capabilities and capacity building in tax authorities may be an integral part of investment policy.
	Preventing tax avoidance and promoting international cooperation on tax matters	3.2.5 Tolerance or facilitation of tax avoidance should not be considered an instrument either to attract inward investment or to support the competitiveness of multinational enterprises abroad. Where countries wish to provide fiscal advantages to attract investors or to support investment overseas, such advantages should be extended through appropriately designed and administered incentives schemes or risk-sharing arrangements, within the boundaries of international commitments.
		3.2.6 Measures preventing tax avoidance can include: (1) requiring, where possible, information from prospective investors that would attest to their responsible fiscal behavior, or even applying stricter tax compliance or transparency conditions and rules for entry and establishment; (2) promoting adherence to Corporate Social Responsibility (CSR) and good governance standards; (3) fostering constructive and transparent dialogue between tax authorities and taxpayers; and (4) subjecting incentives to pre-defined or agreed tax behaviour and on disclosure criteria.
		3.2.7 Well-established and clearly defined transfer pricing rules are essential to minimize tax avoidance. This is especially important in the context of increasing participation in GVCs which have the effect of increasing the scope for transfer price manipulation and making it harder to combat. Developing countries can build on international best practices – alignment of national legislation to internationally established transfer pricing guidelines is important. International cooperation and effective exchange of information between tax authorities is key to counter aggressive tax planning practices.
	Fiscal incentives	3.2.8 Where governments choose to provide fiscal incentives for investors (see section 2.4), these should be provided on a non-discretionary basis and should not by nature seek to compensate for an unattractive or inappropriate general tax regime. As much as possible, fiscal incentives should have sunset clauses after which investor should follow the general fiscal rules.
		3.2.9 The general corporate income tax regime should be the norm and not the exception and proliferation of tax incentives should be avoided as they quickly lead to distortions, including harmful tax competition between countries and a "race to the bottom", generate unintended tax avoidance opportunities, become difficult to monitor, create administrative costs and may end up protecting special interests at the expense of the general public.
		3.2.10 Foreign direct investment incentives schemes should be designed and structured in such a way that they do not provide additional avenues for tax avoidance. They should not create an additional low-tax location in multinational corporate structures. Governments should consider options to design and administer fiscal incentives schemes in such a way that they remove the motivation to shift profits and erode the tax base, e.g. by providing tax breaks for earnings reinvested in productive assets, or focusing tax incentives on capital goods (e.g. rollover relief). Incentives could also be made conditional upon pre-defined or agreed tax behaviour and on disclosure criteria.

Sections	Sub-sections	Policy Guidelines
Investment-related policies (continued)	Double taxation treaties	3.2.11 Double taxation treaties may be an effective tool to promote inward and outward FDI. Developing countries should carefully negotiate such treaties to ensure that the intended purpose of preventing double taxation does not turn into avoidance of all taxation and that the principle of "taxation at the source" prevails.
		3.2.12 A country's international tax treaty network should focus on major countries of origin for the types of investment prioritized in its investment policy.
		3.2.13 Double taxation treaties (DTTs) and International Investment Agreements (IIAs) are both part of countries' investment facilitation toolkit; these instruments should be aligned. International tax policies and international investment policies should be coherent and mutually reinforcing.
	3.3 Intellectual property	
		3.3.1 Laws and regulations for the registration and protection of intellectual property rights and mechanisms for their enforcement should meet the need of prospective investors (especially where investment policy aims to attract investment in IP-sensitive industries) and encourage innovation and investment by domestic and foreign firms, while providing for sanctions against the abuse by IPR holders of IP rights (e.g. the exercise of IP rights in a manner that prevents the emergence of legitimate competing designs or technologies) and allowing for the pursuit of the public good. As national investors are frequently less aware of their IP rights they should be sensitized on the issue.
		3.3.2 Developing countries are encouraged to integrate the flexibilities in IP protection granted under international treaties, including the WTO's TRIPS agreement, into national legislation and consider the extent to which these flexibilities can create opportunities for investment attraction (e.g. in the production of pharmaceuticals).
	3.4 Competition policy	
	Competition laws and regulations	3.4.1 Competition laws and regulations, covering practices in restraint of competition, abuse of market power and economic concentration, together with effective monitoring and enforcement mechanisms, are essential to reap the benefits from investment and should provide fair rules and a level playing field for all investors, foreign and domestic.
	Coordination of investment and competition authorities	3.4.2 Investment policy makers should cooperate closely with competition authorities with a view to addressing any anti-competitive practices by incumbent enterprises that may inhibit investment. Particular attention should be paid to priority industries and investment types.
		3.4.3 Where investment policy pursues objectives for sectors that may be considered to fall under a public services obligation or for regulated sectors (e.g. public transport, utilities, telecommunications), competition authorities should be actively involved in the shaping of relevant policies and measures, coordinating closely with sectoral regulators. Competition authorities play a key role in achieving balance between required returns on private investment in sustainable-development sectors and the need to maintain affordable and accessible public services.

Sections	Sub-sections	Policy Guidelines
Investment-related policies (continued)	M&As and privatizations	3.4.4 Competition laws and decisions related to M&As, as well as the policy framework for privatizations, should support development strategy and investment policy objectives, and should ensure continued attractiveness of the relevant sector for further investment by avoiding market exclusivity and preventing abuse of dominant market power.
		3.4.5 Close coordination between competition authorities in neighbouring countries should be pursued in case of cross-border M&As, particularly in small economies.
	3.5 Labour market regulation	
	Balancing labour market flexibility and protection of employees	3.5.1 Labour market regulations should support job creation objectives in investment policy, including through an appropriate degree of labour market flexibility. At the same time, the rights of workers should be protected by governments and respected by employers.
	Core labour standards	3.5.2 Countries need to guarantee internationally recognized core labour standards, in particular regarding child labour, the right for collective representation and other core protections as guaranteed by the ILO conventions the country is a party to. Effective mechanisms to promote core labour standards should be put in place and applied nation-wide (including in Special Economic Zones, or SEZs) equally to foreign and domestic firms and employees.
	Adjustment costs of investment policy	3.5.3 Adjustment costs or friction caused by shifting productive capacity and employment to priority investment areas, industries or activities as per investment policy should be addressed both in labour market policies (e.g. re-training, social support) and in investment policy (e.g. encouraging investors to help ease transition costs).
	Hiring of international staff	3.5.4 Expatriate staff can at times be critical to the success of individual investment projects by transferring specialized technical skills and know-how. Labour policy and/or immigration policy should avoid unduly restricting or delaying the employment of foreign personnel, (including in skilled trades), by investors in order not to hinder the build-up of productive capacity. At the same time, employment opportunities for nationals in jobs they can adequately fill should be promoted.
		3.5.5 Transfer of skills from expatriate staff to nationals should be actively encouraged, including through technical and vocational training requirements at the company level whenever expatriates are employed. The use of foreign employees in skilled trades/ artisan jobs may be time-bound in order to encourage foreign invested firms to establish local linkages.
	3.6 Access to land	
	Titles	3.6.1 More than the nature of land titles (full ownership, long-term lease, land-use rights or other), predictability and security are paramount for investors. Governments should aim to ease access to land titles, adequately register and protect them, and guarantee stability. Developing and properly administering a national cadastre system can be an effective tool to encourage investment.
		3.6.2 Full ownership of land or tradable land titles can help companies secure financing for investment, as land can be used as collateral. Transferable titles should be encouraged where specific country circumstances do not prevent this option.

Sections	Sub-sections	Policy Guidelines
Investment-related policies (continued)	Agricultural land	3.6.3 Land administration and planning should be developed at all government levels and managed with wide public participation to minimize the risks of land disputes and to ensure that the priorities and interests of local communities are reflected. They should take into account the multifaceted economic, social, cultural, environmental and political aspects of agricultural land distribution and usage. Foreign ownership or user titles over agricultural land are particularly sensitive in most countries, in particular those with large rural populations and where food security is an issue. Appropriate safeguards should protect existing legitimate tenure rights to ensure, for instance, that land negotiations or transactions do not lead to the displacement, the loss of livelihoods, or more limited access to land for the local population without adequate compensation. Governments should pay particular care in putting in place and enforcing regulations to protect the long-term national interest and not compromise it for short-term gains by special interest groups. Adherence to the UNCTAD, FAO, IFAD, and World Bank Principles for Responsible Agricultural Investment should be encouraged.
	Industrial land and industrial parks	3.6.4 The development of industrial, technology or services parks as public-private partnerships has worked well in a number of countries and can be an effective tool to facilitate access to fully-serviced land by (foreign) investors.
	3.7 Corporate responsibility and governance	
	CSR standards	3.7.1 Governments should encourage compliance with high standards of responsible investment and corporate behaviour, including through: (1) capacity building and technical assistance to local industry, especially SMEs, to improve their ability to access markets or work with investors that prefer or require certified products or have supplier codes of conduct related to processing and production methods (important to support GVC participation); (2) public contracting and procurement criteria or financial or fiscal incentives; (3) incorporating existing standards into regulatory initiatives, and/or turning voluntary standards (soft law) into regulation (hard law).
		3.7.2 Country participation in GVCs can also serve as a mechanism to transfer international best practices on CSR issues. SEZs are an important hub in GVCs and present an opportunity for policymakers to address CSR issues on a manageable scale. Governments should consider adopting improved CSR policies, support services and infrastructure in SEZs (e.g. technical assistance for certification and reporting, support on occupational safety and health issues, recycling or alternative energy facilities), transforming them into centers of excellence for sustainable business and making them catalysts for the implementation of CSR.
	Corporate governance	3.7.3 Countries should aim to adopt international principles of corporate governance for large formal businesses under their company law or commercial code, in particular: (1) protection of minority shareholders and equitable treatment of shareholders; (2) prevention of conflicts of interest; (3) effective means of legal redress; (4) transparency and disclosure of comparable company information on a timely, reliable and relevant basis; (5) external auditing of accounts; and (6) adoption of high standards and codes of good practices on corruption, health, environment, and safety issues. The OECD Principles of Corporate Governance and UNCTAD Guidance on Good Practices in Corporate Governance Disclosure may serve as guidance. In dealing with corporate governance issues countries may use a combination of regulatory instruments, voluntary codes and initiatives depending on their legal tradition and stage of enterprise development. Establishing a national Institute of Directors to provide capacity building and technical training to companies on issues of corporate governance can be useful.

Sections	Sub-sections	Policy Guidelines
Investment-related policies (continued)	Reporting standards	3.7.4 Corporate reporting standards should provide for disclosure by foreign-controlled firms on local ownership and control structures, finances and operations, and health, safety, social and environmental impacts, following international best practice. UNCTAD's Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting (ISAR), and UNCTAD's Accounting and Reporting Development Tool, can assist countries with the implementation of international standards, codes and regulations applicable to corporate reporting.
	Promotion of sustainable stock exchanges	3.7.5 Where possible, Governments and security regulators should promote sustainable stock exchanges which provide listed entities with the incentives and tools to improve transparency on environmental, social and corporate governance performance, and allow investors to make informed decisions on responsible allocation of capital. The United Nations Sustainable Stock Exchanges initiative provides guidance.
	3.8 Environmental policy	
	Environmental impact of investment	3.8.1 Environmental impact assessments (EIA) should be part of investment policies; it is useful to classify projects based on a number of pre-defined criteria, including sector, nature, size and location to place more stringent or less stringent requirements on preliminary environmental impact assessments (or absence thereof).
		3.8.2 Environmental norms, including EIA requirements, should be transparent, non-discriminatory vis-à-vis foreign investors, predictable and stable; Governments should ensure that environmental licensing procedures are conducted without undue delay and in full technical objectivity.
	Environmental dumping	3.8.3 Foreign investors should be encouraged to adhere to international best practices of environmental protection and committed not to engage in environmental dumping; in specific cases (e.g. mining or oil extraction), Governments may wish to require international best practices, (including the use of clean technologies), to be strictly adhered to. Governments may also wish to promote adoption of relevant international management system standards such as ISO 14000.
	3.9 Infrastructure, concessioning and PPP policies	
	Opening infrastructure sectors to investors	3.9.1 Given the central role of infrastructure investment in sustainable development objectives and the SDGs, and the potential contribution of private investment to building high-quality infrastructure, countries should consider the extent to which basic infrastructure sectors can be opened to domestic and foreign private investment, and under what conditions, balancing liberalization and regulation, balancing the required returns for private investors with public access and affordability, and balancing increased private investment with continued public involvement (see Core Principles).
	Infrastructure development planning and project pipelines	3.9.2 In sectors opened to private investment, careful efforts should go into identifying specific projects to be taken up by private investors. Infrastructure policy priorities should be made public and part of countries' overall development strategies. Comprehensive national infrastructure development plans, including a pipeline of infrastructure projects (e.g. shortlists of projects for concessioning) across sectors, aligned with sustainable development objectives, are important to underpin the work of investment development agencies (see 2.4.3 above). Governments should initially focus on projects of moderate complexity, where commercial gains are easier to realize for investors, and where the socio-economic gains are clearly measurable.

Sections	Sub-sections	Policy Guidelines
Investment-related policies (continued)	Regional infrastructure development planning	3.9.3 Where regional cooperation on investment (e.g. in regional investment compacts, see 3.1.2 above) results in the development of cross-border infrastructure projects involving two or more jurisdictions, the project objectives should be widely shared and underpinned by formal agreements and dispute resolution mechanisms.
	Concessioning rules and regulations	3.9.4 Following strategic decisions on which sectors to open to private investment, Governments should put in place a carefully crafted legal framework for concession contracts and public-private partnerships. Given the long-term nature of concession agreements in infrastructure, the legal framework should provide significant assurances to investors, including regarding contractual terms and their enforcement, and property rights.
		3.9.5 The legal framework for concession contracts needs to adequately protect the long-term national interest and consumers, ensuring adequate sharing of risks between the private and public partners.
	Competitive outcomes	3.9.6 Wherever possible, concessioning to private investors should aim to introduce competition so as not to replace a public monopoly with a private one. Placing natural monopolies under private concession should be limited to cases where it increases efficiency and the delivery of services. Putting in place appropriate competition and sectoral regulations should be considered a pre-requisite for the successful concessioning of infrastructure services.
	Institutional framework for concessioning and PPPs	3.9.7 Given the complexity of contractual terms involved in large infrastructure concessions, strong institutions need to be put in place first in order to achieve desirable outcomes; in addition to strengthening sectoral regulators, countries should consider the establishment of a dedicated PPP unit with clear mandates and accountability. Independent auditing and monitoring of performance of infrastructure providers at all phases of concessioning projects is fundamental.
	Stimulating investment in green infrastructure	3.9.8 Infrastructure policies should support the development of green infrastructure systems, such as sustainable transport infrastructure, renewables-based electricity, climate resilient and energy and resource efficient infrastructure (see www.greenfdi.org).
4 Investment policy effectiveness	**4.1 Public governance and institutions**	
	From framework to implementation	4.1.1 In the implementation of investment policies Governments should strive to achieve: (1) integrity and impartiality across Government and independence in regulatory institutions, subject to clear reporting lines and accountability to elected officials; (2) transparency and predictability for investors; (3) a service-orientation towards investors, where warranted.
	Regulatory coherence across levels of government	4.1.2 Governments should put in place mechanisms to promote co-ordination between national and sub-national levels of government. They should find ways of identifying cross-cutting regulatory issues and developing regulatory management capacity and performance.

Sections	Sub-sections	Policy Guidelines
Investment policy effectiveness (continued)	Inter-agency cooperation	4.1.3 Close cooperation and formal communication channels should be in place between institutions and agencies dealing with investors. The IPA should play a coordinating role given its comprehensive perspective on issues confronting investors.
	Anti-corruption efforts	4.1.4 Governments should adopt effective anti-corruption legislation and fight corruption with appropriate administrative, institutional and judicial means, for which international best practices should serve as guidance. Investors should be held to adhere to good corporate governance principles, which include refraining from paying bribes and denouncing corrupt practices.
	4.2 Dynamic policy development	4.2.1 Policy design and implementation is a continuous process of fine-tuning and adaptation to changing needs and circumstances. Periodic review (every 3-4 years) of performance against objectives should take place, with a view to: • verifying continued coherence of investment policy with overall development strategy and sustainable development goals, • assessing investment policy effectiveness against objectives through a focused set of indicators, • identifying and addressing underlying causes of underperformance, • evaluating "return on investment" of the more costly investment policy measures (e.g. incentives).
	4.3 Measuring investment policy effectiveness	4.3.1 Objectives for investment policy should be the yard stick for measurement of policy effectiveness. (Where countries have a formal investment strategy it should set out such objectives, see 1.1 above). They should break down objectives for investment attraction and development impact, and set clear priorities. Performance (especially in terms of investment attraction) should be benchmarked against peers. 4.3.2 Indicators for objectives related to the *attraction of investment* may include: • investment inflows (total, by industry, activity,…), • investment flows as a share of gross output and capital formation (idem), • greenfield investment as a share of total investment, - positioning on UNCTAD's *"investment potential/performance matrix".* 4.3.3 Indicators for objectives related to the *impact of investment* may include: • value added of investment activity, • value of capital formation, • export generation, • contribution to the creation of formal business entities, • fiscal revenues, • employment generation and wage contribution, • technology and skills contribution (e.g. as measured through the skill-types of jobs created), • social and environmental measures, • *positioning on UNCTAD's "investment contribution matrix".* 4.3.4 Governments focusing on promoting investment in sustainable development goals should define an appropriate "SDG impact assessment system" with specific indicators for labour/social impact, environmental impact, and development impacts.

IV. FRAMEWORK FOR INTERNATIONAL INVESTMENT AGREEMENTS: OPTIONS

The guidance on international investment policies set out in this chapter aims to translate the Core Principles into concrete options for policymakers, with a view to addressing today's investment policy challenges. While national investment policymakers address these challenges through rules, regulations, institutions and initiatives, at the international level policy is translated through a complex web of treaties (including, principally, bilateral investment treaties, free trade agreements with investment provisions, economic partnership agreements and regional agreements).[18] As discussed in chapter I, the complexity of that web, which leads to gaps, overlaps and inconsistencies in the system of IIAs, is itself one of the challenges to be addressed. The other is the need to strengthen the development dimension of IIAs, balancing the rights and obligations of States and investors, preserving the right to regulate for sustainable development policies and making investment promotion provisions more concrete and aligned with sustainable development objectives.

Addressing IIA challenges requires strategic decision making, conscious IIA design and multilateral consensus building

International investment policy challenges must be addressed at three levels:

1. When formulating their *strategic approach to international engagement on investment*, policymakers need to embed international investment policymaking into their countries' development strategies. This involves deciding whether or not to engage in IIAs, determining how to respond to reform needs concerning existing IIAs (*WIR15*), managing the interaction between IIAs and national policies (e.g. ensuring that IIAs support industrial policies (*WIR11*)) and that between IIAs and other international policies or agreements (e.g. ensuring that IIAs do not contradict international environmental agreements *(WIR10)* or human rights obligations). The overall objective is to ensure coherence between IIAs and sustainable development needs.

2. *In the detailed design of provisions in investment agreements* between countries, policymakers need to incorporate sustainable development considerations, addressing concerns related to the right to regulate (e.g. through reservations and exceptions), balanced rights and obligations of States and investors (e.g. through encouraging compliance with CSR standards), reform of investment dispute settlement, and effective investment promotion (e.g. through home-country measures).

3. *Multilateral consensus building on investment policy*, in turn, can help address some of the systemic challenges stemming from the multi-layered and multi-faceted nature of the IIA regime, including the gaps, overlaps and inconsistencies in the system, its multiple dispute resolution mechanisms, and its piecemeal and erratic expansion. A collective, multilateral approach is also the best way to reform the IIA regime with a view to making it work for sustainable development. Any multilateral engagement would benefit from a multilateral support structure that could offer backstopping functions, through policy analysis, coordination among various processes at different levels and dimensions, management of the interaction with other bodies of law, technical assistance and consensus-building.

This chapter, therefore, first discusses how policymakers can strategically engage in the international investment regime at different levels and in different ways in the interest of sustainable development. It then provides a set of options for the detailed design of IIAs.

UNCTAD's proposed options for addressing the challenges described above come at a time when a multitude of investment stakeholders are putting forward suggestions for the future of IIA policymaking. With multiple negotiations for megaregional agreements ongoing and the international community's search for reform of the international investment regime (*WIR15,* chapters III and IV), IIA policymaking is in one of its more dynamic evolutionary stages, providing a window of opportunity to strengthen the sustainable development dimension of IIAs.

1. DEFINING THE ROLE OF IIAs IN COUNTRIES' DEVELOPMENT STRATEGY AND INVESTMENT POLICY

Defining the role of IIAs in a country's development strategy requires an evaluation of the pros and cons of IIAs and a realistic assessment of what they can do and what they cannot

International investment instruments are an integral part of investment policymaking that supports investment promotion objectives but that can also constrain investment and development policymaking. As a promotion tool, IIAs complement national rules and regulations by offering additional assurances to foreign investors concerning the protection of their investments and the stability, transparency and predictability of the national policy framework. As to the constraints, these could take many forms: they could limit options for countries in the formulation of development strategies that might call for differential treatment of investors, e.g. industrial policies (see *WIR11*); or they could hinder policymaking in general, including for sustainable development objectives, where investors could perceive new measures as unfavourable to their interests and resort to IIA-defined dispute settlement procedures outside the normal domestic legal process.

Given such potential constraints on policymaking, it is important to ensure the coherence of IIAs with other economic policies (e.g. trade, industrial, technology, infrastructure or enterprise policies that aim at building productive capacity and strengthening countries' competitiveness) as well as with non-economic policies (e.g. environmental, social, health or cultural policies).[19] Policymakers should carefully set out an agenda for international engagement and negotiation on investment (including the revision and renegotiation of existing agreements).

When considering the pros and cons of engaging in IIAs (see also, *WIR15,* chapter IV), policymakers should have a clear understanding of what IIAs can and cannot achieve.

CAN

- IIAs ***can***, by adding an international dimension to investment protection and by fostering stability, predictability and transparency, reinforce investor confidence and thus promote investment. From an investor's perspective, IIAs essentially act as an insurance policy, especially important for investments in countries with unfavourable country-risk ratings.

- IIAs ***can*** promote investment in other ways beyond granting investor protection. Some IIAs include commitments on the part of home countries to promote outward investment or to engage in collaborative initiatives for this purpose (although this is currently a small minority of treaties).[20]

- IIAs ***can*** help to build and advertise a more attractive investment climate. By establishing international commitments, they can foster good governance and facilitate or support domestic reforms.

CANNOT

- On the other hand, IIAs alone ***cannot*** turn a bad domestic investment climate into a good one and they cannot guarantee the inflow of foreign investment. There is no mono-causal link between the conclusion of an IIA and FDI inflows; IIAs play a complementary role among many determinants that drive firms' investment decisions.[21] Most importantly, IIAs cannot be a substitute for domestic policies and a sound national regulatory framework for investment.

Host countries' engagement in the current IIA system may not be solely driven by a clear and explicit design that grounds their treaties in a solid development purpose, but rather influenced by the negotiation goals of their treaty partners or other non-economic considerations.[22] As such, there is a risk that IIAs, in number and substance, become largely a vehicle for the protection of interests of investors and home countries without giving due consideration to the development concerns of developing countries. Not surprisingly, a detailed analysis of the substance of model treaties of major outward investing countries shows that, on average, treaty provisions are heavily skewed towards providing a high level of protection, with limited concessions to development aspects that can be a trade-off against investor protection (i.e. leaving countries more policy space generally implies granting less protection to investors). This trade-off suggests that there may be an inherent development challenge in IIAs: developing countries with the most unfavourable risk ratings are most in need of the protecting qualities of IIAs to attract investment, but they are generally also the countries most in need of flexibility (or policy space) for specific development policies.

Moreover, not only low-income developing countries may experience IIAs as a straightjacket, but also higher income countries, and even developed market economies, are sometimes faced with unexpected consequences of their own treaties. As more and more countries with sound and credible domestic legal systems and stable investment climates continue to conclude IIAs granting high levels of investor protection, they risk being confronted themselves with investor-State dispute settlement (ISDS) rules originally intended to shield their investors abroad. This risk is exacerbated by the changing investor landscape, in which more and more developing countries, against whose policies the IIA protective shield was originally directed, are becoming important outward investors in their own right, turning the tables on the original developed country IIA *demandeurs*. Also, the relative share of cases against developed countries is on the rise. In 2014, 40 per cent of all known cases were brought against developed countries, with Spain being the most frequent respondent (*WIR15,* chapter III). The share of cases against developed countries was 47 per cent in 2013, and 34 per cent in 2012, while the historical average is 28 per cent.[23] Spelling out the underlying drivers and objectives of a country's approach to IIAs thus becomes important not only for developing countries, but also for developed ones.

Developed countries are also faced with unexpected consequences of their treaties

In addition to taking into account the development purpose of IIAs, in defining their agenda for international engagement and negotiation on investment, IIA policymakers should:

- *Consider the type of agreements to prioritize,* and whether to go for dedicated agreements on investment or for investment provisions integrated in broader agreements, e.g. covering also trade, competition and/or other policy areas. The latter option provides for comprehensive treatment of inter-related issues in different policy areas. It also recognizes the strong interaction between trade and investment and the blurring boundaries between the two (due to the phenomenon of non-equity modes of international production (*WIR11)* and of global value chains *(WIR13)*), as well as the FDI and trade inducing effect of enlarged markets.
- *Consider whether to pursue international engagement* on investment policy in the context of regional economic cooperation or integration or through bilateral agreements. For smaller developing countries, with limited potential to attract market-seeking investment in their own right, opportunities for regional integration and collaboration on investment policy, particularly when combined with potentially FDI-inducing regional *trade* integration (UNCTAD, 2009), may well take priority over other types of investment agreements. The benefits of this approach may be largest when combined with technical assistance and efforts towards regulatory cooperation and institution building.

- *Set priorities – where countries pursue bilateral collaboration on investment – in terms of treaty partners* (i.e. prioritize the most important home countries of international investors in sectors that are key in the country's development strategy and where foreign involvement is desired).

Furthermore, international engagement on investment policy should recognize that international agreements interact with each other and with other bodies of international law. Policymakers should be aware, for example, that commitments made to some treaty partners may easily filter through to others through most-favoured nation (MFN) clauses, with possibly unintended consequences. Commitments may clash, or hard-won concessions in a negotiation (e.g. on flexibility for performance requirements) may be undone through prior or subsequent treaties.

IIAs have wider implications for policy and systemic coherence

Finally, a particularly sensitive policy issue is whether to include liberalization commitments in IIAs by granting pre-establishment rights to foreign investors. Most IIAs grant protection to investments from the moment they are established in the host State; the host country thus retains discretion with respect to the admission of foreign investors to its market. However, in recent years an increasing number of IIAs include provisions that apply in the pre-establishment phase of investment, committing to a more open environment for investment, at the cost of a lower degree of discretion in regulating entry matters domestically. When granting pre-establishment rights, managing the interaction between international and national policies is particularly crucial: policymakers can use IIAs to bind – at the international level – the degree of openness granted in domestic laws; or they can use IIA negotiations as a driving force for change, fostering greater openness at the national level (*WIR04*).[24] Granting pre-establishment rights also adds new complexities to the interaction between agreements.

The following section, which discusses how today's investment policy challenges can be addressed in the content and detailed provisions of IIAs, covers both pre- and post-establishment issues. Policymakers have so far mostly opted for agreements limited to the post-establishment phase of investment; where they opt for pre-establishment coverage, numerous tools are available to calibrate obligations in line with their countries' specific needs.

2. NEGOTIATING SUSTAINABLE-DEVELOPMENT-FRIENDLY IIAs

Addressing sustainable development challenges through the detailed design of provisions in investment agreements principally implies four areas of evolution in treaty-making practice. Such change can be promoted either by including new elements and clauses into IIAs, or by taking a fresh approach to existing, traditional elements.

Negotiating sustainable-development-friendly IIAs requires more concrete investment promotion provisions, balancing rights and obligations of States and investors, safeguarding the right to regulate and reforming the ISDS system

1. Incorporating concrete commitments to promote and facilitate investment for sustainable development: Currently, IIAs mostly promote foreign investment only indirectly through the granting of investment protection – i.e. obligations on the part of host countries – and do not contain commitments by home countries to promote responsible investment. Most treaties include hortatory language on encouraging investment in preambles or non-binding provisions on investment promotion. Options to improve the investment promotion aspect of treaties include concrete facilitation mechanisms (information sharing, investment promotion forums), outward investment promotion schemes (insurance and guarantees), technical assistance and capacity-building initiatives targeted at sustainable investment, supported by appropriate institutional arrangements for long-term cooperation.

2. Balancing State commitments with investor obligations and promoting responsible investment: Most IIAs currently provide for State obligations but do not specify investor obligations or responsibilities. Legally binding obligations on companies and individuals are stipulated by national law but are absent in international treaties, which traditionally do not apply to private parties directly.[25] However, there are examples where IIAs impose obligations on investors (e.g. COMESA Investment Agreement of 2007[26]) or where international conventions establish criminal responsibility of individuals (e.g. the Rome Statute of the International Criminal Court). A recent resolution by the UN Human Rights Council establishes an open-ended intergovernmental working group with the mandate to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.[27] These examples, together with the changes in the understanding of the nature and functions of international law, would suggest that international treaties can, in principle, impose obligations on private parties.[28] While stopping short of framing IIAs so as to impose outright obligations on investors, a few options may merit consideration. For example, IIAs could include a requirement for investors to comply with investment-related national laws of the host State when making and operating an investment, and even at the post-operations stage

(e.g. environmental clean-up), provided that such laws conform to the host country's international obligations, including those in the IIA.[29] Such an investor obligation could be the basis for further stipulating in the IIA the consequences of an investor's failure to comply with domestic laws, such as the right of host States to make a counter-claim in ISDS proceedings with the investor. In addition, IIAs could refer to commonly recognized international standards (e.g. the UN Guidelines on Business and Human Rights). This would not only help balance State commitments with investor obligations but also support the spread of CSR standards – which are becoming an ever more important feature of the investment policy landscape *(WIR11)*. Options for treaty language in this regard could range from commitments to promote best international CSR standards to ensuring that tribunals consider an investor's compliance with CSR standards when deciding an ISDS case.

3. Ensuring an appropriate balance between protection commitments and regulatory space for development: IIAs protect foreign investment by committing host country governments to grant certain standards of treatment and protection to foreign investors; it is the very nature of an IIA's standards of protection, and the attendant stabilizing effect, to place limits on governments' regulatory freedom. For example, where host governments aim to differentiate between domestic and foreign investors, or require specific corporate behaviour, they would be constrained by IIA provisions on non-discrimination or on performance requirements. In addition, to the extent that foreign investors perceive domestic policy changes to negatively affect their expectations, they may challenge them under IIAs by starting arbitration proceedings against host States. Countries can safeguard some policy space by carefully crafting the structure of IIAs and by clarifying the scope and meaning of particularly vague treaty provisions such as the fair and equitable treatment standard and expropriation as well as by using specific flexibility mechanisms such as general or national security exceptions and reservations. IIA models, such as the one adopted by the United States in 2004, offer early examples in this regard. More recently, newly negotiated treaties (see WIR annex tables on UNCTAD's investment policy hub) and recent policy proposals stress the need to safeguard the right to regulate (see, for example, new approaches by the European Union, Germany, Indonesia or Norway; *WIR15*, chapter III). The right balance between protecting foreign investment and maintaining policy space for domestic regulation should flow from each country's development strategy, ensuring that flexibility mechanisms do not erode a principal objective of IIAs – their potentially investment enhancing effect.

4. Reforming the ISDS system: Most IIAs reinforce their investment protection provisions by allowing investors directly to pursue relief through ISDS. The strength of IIAs in granting protection to foreign investors has become increasingly evident through the number of ISDS cases brought over the last decade, most of which are directed at developing countries. Host countries have faced claims of up to $114 billion and awards of up to $50 billion.[30] Added to these financial liabilities are the costs of procedures, all together putting a significant burden on defending countries and exacerbating the concerns related to policy space. Host countries – both developed and developing – have experienced that the possibility of bringing ISDS claims can be used by foreign investors in unanticipated ways. A number of recent cases have challenged measures adopted in the public interest (e.g. measures to promote social equity, foster environmental protection or protect public health), and show that the borderline between protection from political risk and undue interference with legitimate domestic policies is becoming increasingly blurred. Shielding countries from unjustified liabilities and excessive procedural costs through treaty design thus involves looking at options both in ISDS provisions themselves and in the scope and application of substantive clauses (see below).

These areas of evolution are also relevant for "pre-establishment IIAs", i.e. agreements that – in addition to protecting established investors – contain binding rules regarding the establishment of new investments. While a growing number of countries opt for the pre-establishment approach, it is crucial to ensure that any market opening through IIAs is in line with host countries' development strategies. Relevant provisions opt for selective liberalization, containing numerous exceptions and reservations designed to protect a country from over-committing and/or ensuring flexibilities in the relevant treaty obligations (see box 9).

Making pre-establishment commitments adds further complexities to IIA negotiations

These four types of evolution in current treaty practice filter through to specific clauses in different ways. The following are examples of how this would work, focusing on some of the key provisions of current treaty practice – scope and definition, national treatment, most-favoured nation treatment, fair and equitable treatment, expropriation and ISDS. In addition to shaping specific clauses, sustainable development concerns can also be addressed individually, e.g. through special and differential treatment (SDT), a key aspect of the multilateral trading system but largely unknown in IIA practice (see box 10).

Box 9. Pre-establishment commitments in IIAs

By the end of 2014, pre-establishment IIAs totaled 228 (7 per cent of all concluded IIAs) and their share has been on the rise in recent years. Most pre-establishment IIAs involve developed economies, in particular Canada, the European Union, Finland, Japan and the United States. Taken together, these economies are party to 70 per cent of all pre-establishment IIAs signed worldwide. Also, a few developing countries in Asia and Latin America have been actively concluding pre-establishment IIAs; they include Chile, Costa Rica, the Republic of Korea, Peru and Singapore (*WIR15*, chapter III).

Extending IIA coverage to pre-establishment issues is an important policy choice per se, and where countries decide to do so it involves further choices in finding the right balance between binding international commitments and domestic policy flexibility.

Pre-establishment IIAs signal that a country is generally committed to an open investment environment, although the sole fact that a country concludes only post-establishment IIAs does not necessarily mean that it follows a restrictive FDI policy. Also, pre-establishment commitments in IIAs do not necessarily mirror the actual degree of openness of an economy. Establishment rights in IIAs can remain below this level (i.e. so that the State concerned retains latitude to tighten PE conditions) or go beyond it (i.e. IIAs can be used to open up hitherto closed industries to foreign investors).

From a foreign investor's perspective, they help "lock in" the existing level of openness, make the regulatory environment more transparent and, in some instances, open new investment opportunities. From a host-country perspective, pre-establishment commitments may improve the country's attractiveness as an investment destination. Entering pre-establishment commitments requires sufficient institutional capacity to conduct a thorough audit of existing domestic policies and to consider possible future regulatory needs.

Pre-establishment IIAs typically operate by extending national treatment, MFN treatment and certain other treaty obligations[a/] to the "establishment, acquisition and expansion" of investments. This prevents each contracting party from treating investors from the other contracting party less favourably than it treats its own investors and/or investors from other countries in these matters.

Properly defining the scope of pre-establishment commitments is key. The two main mechanisms are the negative and positive listing of committed sectors/industries as well as scheduling of non-conforming measures in committed sectors. The negative-list approach offers liberalization across the board and investors benefit from pre-establishment commitments in all sectors/industries except in those that are explicitly excluded. A positive-list approach offers selective liberalization by way of drawing up a list of industries in which investors will enjoy pre-establishment rights. In treaty practice to date, the negative-list approach has been prevalent.

The negative-list approach is more demanding in terms of resources: it requires a thorough audit of existing domestic policies. In addition, under a negative-list approach and in the absence of specific reservations, a country commits to openness also in those sectors/activities that at the time the IIA is signed may not yet be of great economic importance in the country, or where regulatory frameworks are still evolving.

In committed sectors (regardless of whether they are committed on the negative- or positive-list basis), contracting parties may make reservations to the pre-establishment IIA obligations. Reservations can maintain existing non-conforming measures ("standstill") and/or retain the right to adopt new non-conforming measures in the future.

In addition, some treaties include "safety valves" that allow parties to modify their reservation schedules after the treaty enters into force (subject to certain conditions). Furthermore, treaties sometimes exclude pre-establishment matters from the scope of ISDS so that any disputes on these issues are subject to State-State dispute resolution only.

Source: UNCTAD.

[a/] Typically, these other obligations include prohibition of performance requirements and prohibition of nationality requirements for senior management and board members.

Box 10. Special and differential treatment (SDT) and IIAs

A large number of IIAs are concluded between developed and developing countries. SDT gives legal expression to the special needs and concerns of developing countries and/or least developed countries in international (economic) agreements. It is based on the notion that treaty parties at different stages of development should not necessarily be bound by the same obligations.

Expression of the principle can be found in a multilateral context in over 145 provisions of WTO agreements,[31] essentially (i) granting less onerous obligations to developing countries – either permanently or temporarily; and/or (ii) imposing special obligations on developed countries vis-à-vis developing countries.[32] Over time, SDT has found its way into other aspects of international relations, most prominently international environmental law, including the climate change framework.

Thus far, SDT has largely been absent from IIAs. Despite incorporating the general concepts of policy space and flexibility for development, IIAs – being mostly of a bilateral nature – are based on legal symmetry and reciprocity, meaning that the rights and obligations of the parties are generally the same. Moreover, IIAs typically do not deal with pre-establishment/market access issues, for which SDT considerations are particularly relevant.

Exceptionally, however, the COMESA Investment Agreement contains an SDT clarification with respect to the fair and equitable treatment standard: "*For greater certainty, Member States understand that different Member States have different forms of administrative, legislative and judicial systems and that Member States at different levels of development may not achieve the same standards at the same time.*"[33]

Reinvigorating SDT with a view to making IIAs work better for sustainable development could take a number of forms. For example, lower levels of obligations for developing countries could be achieved through (i) development-focused exceptions from obligations/commitments; (ii) best endeavour commitments for developing countries; (iii) asymmetrically phased implementation timetables with longer time frames for developing countries; or (iv) a development-oriented interpretation of treaty obligations by arbitral tribunals. Best endeavour commitments by more advanced countries could, for example, relate to: (i) technical assistance and training (e.g. assisting in the handling of ISDS cases or when putting in place appropriate domestic regulatory systems to ensure compliance with obligations); (ii) promotion of the transfer/dissemination of technology; (iii) support and advice for companies from developing countries (e.g. to become outward investors or adopt CSR standards); (iv) investment promotion (e.g. provide outward investment incentives such as investment guarantees, tax breaks).

While SDT remains largely absent from IIAs, negotiators could consider adding SDT elements, offering a further promising tool for making IIAs more sustainable-development-friendly, particularly for least-developed and low-income countries.

Source: UNCTAD.

- *Scope and Definition:* An IIA's coverage determines the investments/investors that benefit from the protection offered by the IIA. Past disputes have demonstrated the potential of IIAs to be interpreted broadly, so as to apply to types of transactions that were originally not envisaged to benefit from the IIA (such as government debt securities).[34] When negotiating an IIA with a stronger sustainable development dimension, it may thus be appropriate to safeguard policy space and exclude some types of financial transactions (e.g. portfolio investment or short-term, speculative financial flows) from a treaty's scope and to focus application of the treaty to those types of investment that the contracting parties wish to attract (e.g. direct investment in productive assets).

  Whether IIAs should exclude portfolio investment is a policy choice that has been subject to intense debate. Portfolio investment can make a contribution to development by providing financial capital. However, the sometimes volatile nature of portfolio investment flows can be damaging. At the practical level, portfolio and direct investment are often difficult to differentiate, both in terms of identifying relevant financial flows of either type, and in terms of targeted policy instruments.

  It may also be appropriate to exclude from a treaty's scope specific areas of public policy or specific (sensitive) economic sectors. Or, in order to limit liability and to avoid "treaty shopping" and "roundtrip investment", it may be appropriate to confine application to genuine investors from the contracting parties, excluding investments that are only channelled through legal entities based in the contracting parties.

- *National Treatment (NT):* National treatment protects foreign investors against discrimination vis-à-vis comparable domestic investors, with a view to ensuring a "level playing field". Non-discriminatory treatment is generally considered conducive to good governance and is, in principle, enshrined in many countries' domestic regulatory frameworks. Nevertheless, even if national treatment is provided under domestic legislation, countries may be reluctant to "lock in" all aspects of their domestic regulatory framework at the international level (e.g. private sector development initiatives, including regulatory, financial or fiscal incentives) and, depending on their development strategy, States may wish to afford preferential treatment to national investors/investments as part of industrial development policies or for other reasons. In such cases, negotiators could circumscribe the scope of national treatment clauses and/or allow for derogations (e.g. through the lodging of reservations excluding sectors, policy areas or specific measures from its application (see *WIR11*)).

- *Most-Favoured Nation (MFN) Treatment:* MFN clauses aim to prevent discrimination between comparable investors of different foreign nationality. The meaning of such treatment has been subject to diverging and unanticipated interpretations by tribunals. Several arbitral decisions interpreted MFN as allowing investors to invoke more investor-friendly

language from treaties between the respondent State and a third country, thereby effectively sidelining the "base" treaty (i.e. the actual treaty between the investor's home and host country on the basis of which the case was brought). This practice can be seen in a positive light as "upward harmonization" of IIA standards or in a negative one as "cherry picking" best clauses from different treaties, endangering individual treaty bargains. MFN treatment needs to be carefully considered, particularly in light of countries' growing networks of IIAs with different obligations and agreements including pre-establishment issues. To avoid misinterpretation, IIAs have started explicitly to exclude dispute settlement issues as well as obligations undertaken in treaties with third States from the scope of the MFN obligation. Other options include limiting the clause's reach through country-specific reservations. In sum, the MFN clause is a crucial provision for IIA reform. Failure to take appropriate action with respect to the MFN clause can undermine improved formulations of treaty provisions (*WIR15*).

- *Fair and Equitable Treatment (FET):* The obligation to accord fair and equitable treatment to foreign investments appears in the great majority of IIAs. Investors (claimants) have frequently – and with considerable success – invoked it in ISDS. There is a great deal of uncertainty concerning the precise meaning of the concept, because the notions of "fairness" and "equity" do not connote a clear set of legal prescriptions in international investment law and allow for a significant degree of subjective judgment. Some tribunals have read an extensive list of disciplines into the FET clause, which are taxing on any State, but especially on developing and least-developed countries; lack of clarity persists regarding the appropriate threshold of liability. The use of FET to protect investors' legitimate expectations can indirectly restrict countries' ability to change investment-related policies or to introduce new policies – including those for the public good – that may have a negative impact on individual foreign investors. Options to reduce uncertainty regarding States' liabilities and to preserve the right to regulate include qualifying or clarifying the FET clause, including by way of an exhaustive list of State obligations under FET, or even considering omitting it.
- *Expropriation:* An expropriation provision protects foreign investors/investments against dispossession or confiscation of their property by the host country without compensation. As most IIAs also prohibit indirect expropriation (i.e. apply to regulatory takings), and as some arbitral tribunals have tended to interpret this broadly (i.e. including legitimate regulatory measures in the pursuit of the public interest), the expropriation clause has the potential to pose undue constraints on a State's regulatory capacity. To avoid this, policymakers could clarify the notion of indirect expropriation and introduce criteria to distinguish between indirect expropriation and legitimate regulation that does not require compensation.

- *Investor-State Dispute Settlement (ISDS):* Originally, the system of international investor-State arbitration was conceived as an effective tool to enforce foreign investors' rights. It offered direct access to international arbitration for investors to avoid national courts of host countries and to solve disputes in a neutral forum that was expected to be cheap, fast, and flexible. It was meant to provide finality and enforceability, and to depoliticise disputes. While some of these advantages remain valid, the ISDS system has more recently displayed serious shortcomings (e.g. inconsistent and unintended interpretations of clauses, unanticipated uses of the system by investors, challenges against policy measures taken in the public interest, costly and lengthy procedures, limited or no transparency), undermining its legitimacy. While some ISDS concerns can be addressed effectively only through a broader approach requiring international collaboration, negotiators can go some way to improving the institutional and procedural aspects of ISDS and to limiting liability and the risk of becoming embroiled in costly procedures. They can do so by qualifying the scope of consent given to ISDS, promoting the use of alternative dispute resolution (ADR) methods, increasing transparency of procedures, encouraging arbitral tribunals to take into account standards of investor behaviour when settling investor-State disputes, limiting resort to ISDS and increasing the role of domestic judicial systems, providing for the possibility of counterclaims by States, or even refraining from offering ISDS.[35] (For an overview of the pros and cons of ISDS and of State-State dispute settlement see *WIR15*, chapter IV).

3. POLICY OPTIONS FOR PRE- AND POST-ESTABLISHMENT TREATIES

Policymakers have a menu of options for negotiating IIAs ...

The table on IIA-elements (see page 88-118) contains a comprehensive compilation of policy options available to IIA negotiators, including options to operationalize sustainable development objectives (see table 6). The options include both mainstream IIA provisions as well as more idiosyncratic treaty language used by fewer countries. In some instances, the IIA-elements table contains new suggestions by UNCTAD.[36]

As a comprehensive set of policy options, the IIA-elements table aims to represent two different approaches on the design of IIAs. At one side of the spectrum is the school of thought that prefers IIAs with straightforward provisions focusing on investment protection and limiting clarifications and qualifications to the minimum. At the other side, a comprehensive approach to investment policymaking adds a host of considerations – including on sustainable development – in the wording of IIA clauses.

Table 6. Policy options to operationalize sustainable development objectives in IIAs

	Mechanisms	Examples
Adjusting existing/ common provisions to make them more sustainable-development-friendly through clauses that: • safeguard policy space • limit State liability	Hortatory language	• *Preamble:* stating that attracting responsible foreign investment that fosters sustainable development is one of the key objectives of the treaty.
	Clarifications	• *Expropriation:* specifying that non-discriminatory good faith regulations pursuing public policy objectives do not constitute indirect expropriation. • *FET:* including an exhaustive list of State obligations.
	Qualifications/ limitations	• *ISDS:* prohibiting recourse to ISDS after a certain time period has passed after the events giving rise to the claim ("limitations period"). • *ISDS:* preventing "abuse" of the treaty by denying ISDS access to investors who engage in "treaty shopping" or nationality planning through "mailbox" companies that channel investments but do not engage in any real business operations in the home State.
	Reservations/ carve-outs	• *Country-specific reservations* to NT, MFN or pre-establishment obligations, carving out policy measures (e.g. subsidies), policy areas (e.g. policies on minorities, indigenous communities) or sectors (e.g. social services).
	Exclusions from coverage/ exceptions	• *Scope and definition:* excluding portfolio, short-term or speculative investments from treaty coverage. • *General exception* for domestic regulatory measures that aim to pursue legitimate public policy objectives.
	Omissions	• Omit FET, umbrella clause.
Adding new provisions or new, stronger paragraphs within provisions for sustainable development purposes to: • balance investor rights and responsibilities • promote responsible investment • strengthen home-country support	Investor obligations and responsibilities	• Requirement that investors comply with host State laws at both the entry and the post-entry stage of an investment. • Encouragement to investors to comply with universal principles or to observe applicable CSR standards.
	Institutional set-up for sustainable development impact	• Institutional set-up under which State parties cooperate to e.g. review the functioning of the IIA or issue interpretations of IIA clauses. • Call for cooperation between the Parties to promote observance of applicable CSR standards.
	Home-country measures to promote responsible investment	• Encouragement to offer incentives for sustainable-development-friendly outward investment; investor compliance with applicable CSR standards may be an additional condition. • Technical assistance provisions to facilitate the implementation of the IIA and to maximize its sustainable development impact, including through capacity building on investment promotion and facilitation.
Introducing Special and Differential Treatment for the less developed Party – with effect on both existing and new provisions – to: • calibrate the level of obligations to the country's level of development	Lower levels of obligations	• Pre-establishment commitments that cover fewer economic activities.
	Development-focused exceptions from obligations/ commitments	• Reservations, carving out sensitive development related areas, issues or measures.
	Best endeavour commitments	• FET, NT commitments that are not legally binding.
	Asymmetric implementation timetables	• Phase-in of obligations, including pre-establishment, NT, MFN, performance requirements, transfer of funds and transparency.

The objective of the IIA-elements table is to provide policymakers with an overview of options for designing an IIA. It offers a broad menu from which IIA negotiators can pick and choose. This table is not meant to identify preferred options for IIA negotiators or to go so far as to suggest a model IIA. However, the table briefly comments on the various drafting possibilities with regard to each IIA provision and highlights – where appropriate – their implications for sustainable development. It is hoped that these explanations will help IIA negotiators identify those drafting options that best suit their countries' needs, preferences and objectives.

The IIA-elements table includes various options that could be particularly supportive of sustainable development. Examples are:

... some negotiating options are more supportive of sustainable-development objectives

- Including a scope and definitions clause that excludes portfolio, short-term or speculative investments from treaty coverage and that addresses "treaty-shopping" through "mailbox companies".
- Designing MFN clauses that provide predictability regarding their coverage and that do not obviate the desired effects of newly crafted treaty provisions.
- Formulating an FET clause as an exhaustive list of State obligations (e.g. not to (i) deny justice in judicial or administrative procedures, (ii) treat investors in a manifestly arbitrary manner, (iii) flagrantly violate due process, etc.).
- Clarifying – to the extent possible – the distinction between legitimate regulatory activity and regulatory takings (indirect expropriations) giving rise to compensation.
- Limiting the Full Protection and Security (FPS) provision to "physical" security and protection only and specifying that protection shall be commensurate with the country's level of development.
- Limiting the scope of a transfer of funds clause by providing an exhaustive list of covered payments/transfers; including exceptions in case of serious balance-of-payments difficulties; and conditioning the transfer right on the investor's compliance with its fiscal and other transfer-related obligations in the host country.
- Including carefully crafted exceptions to protect human rights, health, core labour standards and the environment, with well working checks and balances, so as to guarantee the right to regulate while avoiding abuse.
- Including an exception that enables States to introduce emergency measures when its essential security interests are threatened or for the maintenance of international peace and security.
- Devising an effective system for settling investment disputes that responds to the legitimacy concerns the system is facing, taking into account, among others, the quality of treaty partners' administrative and judicial systems.

- Establishing an institutional set-up that makes the IIA adaptable to changing development contexts and major unanticipated developments (e.g. ad hoc committees to assess the effectiveness of the agreement and to further improve its implementation through amendments or interpretations).

The table with IIA-elements recognizes that specific policy objectives can be pursued by different treaty elements, thereby inviting treaty drafters to choose their "best-fit" combination. For example, a country that wishes to preserve regulatory space for public health policies can opt for (i) excluding public health policies from the scope of specific provisions (e.g. national treatment); (ii) scheduling reservations (for national treatment or the prohibition of performance requirements) for specific (existing and/or future) public health policies; (iii) including public health as a legitimate policy objective in the IIA's general exceptions; or (iv) referring to the protection of public health in the preamble of the agreement.

IIA negotiators have to choose their "best-fit" combination of policy options

The IIA-elements table also reflects the fact that negotiators can determine the normative intensity of IIA provisions: they can ensure the legally binding and enforceable nature of some obligations while at the same time resorting to hortatory, best endeavour language for others. These choices can help negotiators design a level of protection best suited to the specific circumstances of negotiating partners and in line with the need for proper balancing between investment protection and the right to regulate for sustainable development.

The ultimate shape of an IIA is the result of a specific combination of options that exist in respect of each IIA provision. It is this blend that determines where on a spectrum between utmost investor protection and maximum policy flexibility a particular IIA is located. The same holds true for the IIA's impact on sustainable development. Combinations of and interactions between IIA provisions can take a number of forms:

- *Interaction between a treaty's scope/definitions and the obligations it establishes for the contracting parties:* An agreement's "protective strength" stems not only from the substantive and procedural standards of protection it offers to investors, but also from the breadth and variety of categories of investors and investments it covers (i.e. that benefit from the standards of protection offered by the IIA). Hence, when designing a particular IIA and calibrating the degree of protection it grants, negotiators can use different combinations of the two. For example, (i) a broad open-ended definition of investment could be combined with few substantive obligations, or with obligations formulated in a manner reducing their "bite"; or (ii) a narrow definition of investment (e.g. covering direct investments in a few priority sectors only) could be combined with more expansive protections such as an unqualified FET standard or the prohibition of numerous performance requirements.

- *Interaction between protection-oriented clauses:* Some IIAs combine narrowly drafted clauses in some areas with "broad" provisions in others. An example is the combination between a carefully circumscribed expropriation clause and an unqualified FET provision. Another option is to limit the impact of ISDS by either formulating substantive standards of protection as best endeavour (i.e. hortatory) clauses, or by precluding the use of ISDS in respect of particularly vague treaty articles, such as the FET standard.[37] Under such scenarios, protective standards may still have a good-governance-enhancing effect on host countries' regulatory framework, while reducing the risk to be drawn into ISDS. Consideration also has to be given to the interaction with the MFN provision: with the inclusion of a "broad" MFN clause, investors may be tempted to circumvent "weak" protection clauses by relying on more protective (i.e. "stronger") clauses in treaties with third parties.
- *Interaction between protection and exceptions:* Strong protection clauses and effective flexibilities for contracting parties are not mutually exclusive; rather, the combination of the two helps achieve a balanced agreement that meets the needs of different investment stakeholders. For example, an IIA can combine "strong" substantive protection (e.g. non-discrimination, capital transfer guarantees) with "strong" exceptions (e.g. national security exceptions or general exceptions to protect essential public policy objectives).[38]

The policy options presented in the IIA-elements table are grounded in the Core Principles. For example, (i) the principle of investment protection directly manifests itself in IIA clauses on FET, non-discrimination, capital transfer, protection in case of expropriation or protection from strife; (ii) the principle of good governance is reflected, amongst others, in IIA clauses that aim at increasing host State's transparency regarding laws and regulations or in IIA clauses that foster transparency by the foreign investor vis-à-vis the host State; (iii) the right to regulate principle is reflected, amongst others, in IIA clauses stating that investments need to be in accordance with the host country's laws, allowing countries to lodge reservations (including for future policies); clarifying and circumscribing the content of indirect expropriation or general exceptions.

4. IMPLEMENTATION AND INSTITUTIONAL MECHANISMS FOR POLICY EFFECTIVENESS

IIAs require follow-up activities after negotiation, including preventing disputes and assessing whether the agreement delivers the expected objectives

Implementation of IIAs at the national level entails:

- *Completing the ratification process.* This may vary from a few months to several years, depending on the countries involved and the concrete issues at stake. The distinction between the conclusion of an agreement and its entry into force is important, since the legal rights and obligations deriving from it do not become effective before the treaty has entered into force. The time lag between the conclusion of an IIA and its entry into force may therefore have implications, for both foreign investors and their respective host countries.
- *Bringing national laws and practices into conformity with treaty commitments.* As with any other international treaty, care needs to be taken that the international obligations arising from the IIA are properly translated into national laws and regulations, and depending on the scope of the IIA, e.g. with regard to transparency obligations, also into the administrative practices of the countries involved.
- *Disseminating information about IIA obligations.* Informing and training ministries, government agencies and local authorities on the implications of IIAs for their conduct in regulatory and administrative processes is important so as to avoid other arms of the government causing conflicts with treaty commitments and thus giving rise to investor grievances, which if unresolved could lead to arbitral disputes.
- *Preventing disputes*, including through ADR mechanisms. This may involve the establishment of adequate institutional mechanisms to prevent disputes from emerging and avoid the breach of contracts and treaties on the part of government agencies. This involves assuring that the State and various government agencies take account of the legal obligations made under investment agreements when enacting laws and implementing policy measures, and establishing a system to identify more easily potential areas where disputes with investors can arise, and to respond to the disputes where and when they emerge.
- *Managing disputes* that may arise under IIAs. If dispute prevention efforts fail, States need to be prepared to engage effectively and efficiently in managing the disputes from beginning to end. This involves setting up the required mechanisms to take action in case of the receipt of a notice of arbitration, to handle the case, and ultimately to bring it to a conclusion, including possibly through settlement.
- *Establishing a review mechanism* to verify periodically the extent to which the IIA contributes to achieving expected results in terms of investment attraction and enhancing sustainable development – while keeping in mind that there is no mono-causal link between concluding an IIA and investment flows.

Moreover, because national and international investment policy must be considered in an integrated manner, and both need to evolve with a country's changing circumstances, countries have to assess continuously the suitability of their policy choices with regard to key elements of investment protection and promotion, updating model treaties and renegotiating existing IIAs, both in a bilateral and/or regional context.

Undertaking these implementation and follow-up efforts effectively and efficiently can be burdensome for developing countries, especially the least developed ones, because they often lack the required institutional capabilities or financial and human resources. Similarly, they often face challenges when it comes to analyzing ex ante the scope of obligations into which they are entering when they conclude an IIA, and the economic and social implications of the commitments contained in IIAs.

International organizations support countries in their strive for sustainable-development-friendly IIAs

This underlines the importance of capacity-building and technical cooperation to help developing countries in assessing various policy options before entering into new agreements and subsequently to assist them in implementing their commitments. IIAs can include relevant provisions to this end, including setting up institutional frameworks under which the contracting parties (and, where appropriate and relevant, other IIA stakeholders such as investors or civil society) can review progress in the implementation of IIA commitments, with a view to maximizing their contribution to sustainable development. International organizations can also play an important capacity building role.

UNCTAD's Investment Policy Framework for Sustainable Development

Summary of contents

PART A. POST-ESTABLISHMENT

Sections		Description
1	Preamble	... sets out objectives of the treaty and the intentions of the Contracting Parties
2	Treaty scope	... defines the investment and investors protected under the treaty and its temporal application
3	Admission	... governs entry of investments into the host State
4	Standards of treatment and protection	... prescribe the treatment, protection and rights which host States are required to accord foreign investors/ investments
5	Public policy and national security exceptions	... permit public policy and national security-related measures, otherwise inconsistent with the treaty, to be taken under specified, exceptional circumstances
6	Dispute settlement	... governs settlement of disputes between the Contracting Parties and those between foreign investors and host States
7	Investor obligations and responsibilities	... promote compliance by investors with domestic and/or international norms at the entry and operation stage
8	Relationship to other agreements	... establishes a hierarchy in case of competing international norms
9	Not lowering of standards clause	... discourages Contracting Parties from attracting investment through the relaxation of labour or environmental standards
10	Investment promotion	... aims to encourage foreign investment through additional means beyond investment protection provisions in IIAs
11	Institutional set-up	... establishes an institutional platform for collaboration between the Contracting Parties
12	Final provisions	... define the duration of the treaty, including its possible prolongation

PART B. PRE-ESTABLISHMENT

1	Overall approach to pre-establishment	... determines whether and how the treaty applies to acquisition and establishment of investments
2	Ratcheting mechanism	... determines whether unilateral domestic liberalization measures are "locked in" by the IIA
3	Reservations	... preserve the right to maintain existing non-conforming measures and/or adopt new non-conforming measures in the future
4	Enforcement of pre-establishment obligations	... determines how pre-establishment obligations can be enforced and interpreted
5	Other treaty provisions	... provide flexibility or circumscribe the scope of the treaty as a whole (including its pre-establishment obligations)

PART C. SPECIAL AND DIFFERENTIAL TREATMENT (SDT)

1	Asymmetrical obligations	... enable imposition of less onerous obligations on a less developed Contracting Party
2	Additional tools	... encourage positive contributions by a more developed Contracting Party

UNCTAD's Investment Policy Framework for Sustainable Development

POLICY OPTIONS FOR IIAS

PART A. POST-ESTABLISHMENT

The different sections of the table, starting with the preamble and closing with the final provisions, follow the order of articles as commonly found in IIAs. Where possible, the policy options are organized along a scale ranging from i) the most investor-friendly or most protective to ii) the options providing more flexibility to the State, balance and/or legal precision. In some sections, two or more policy options can be combined.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
1 Preamble ... sets out the objectives of the treaty and the intentions of the Contracting Parties	1.1.0 Refer to the objective of creating and maintaining favourable conditions for investment and intensifying economic cooperation between the Parties. 1.1.1 Clarify that the Parties conclude this IIA with a view to: • attracting and fostering responsible inward and outward foreign investment that contributes to sustainable development • promoting good governance • creating jobs • transferring technology and know-how. 1.1.2 Clarify that the investor protection objectives shall not override States' national development objectives and the right to regulate in the public interest including with respect to certain important policy goals, such as: • sustainable development • protection of human rights • maintenance of health, labour and/or environmental standards • corporate social responsibility and good corporate governance. 1.1.3 Indicate that the promotion and protection of investments should be pursued in compliance with the Parties' obligations under international law including in particular their obligations with respect to human rights, labour rights and protection of the environment.	The treaty preamble does not set out binding obligations but plays a significant role in interpreting substantive IIA provisions. When a preamble refers to the creation of "a stable framework for investments" or "favourable conditions for investments" as the sole aim of the treaty (i.e. if the IIA only refers to those objectives), tribunals will tend to resolve interpretive uncertainties in favour of investors. In contrast, where a preamble complements investment promotion and protection objectives with other objectives such as sustainable development or the Contracting Parties' right to regulate, this can lead to more balanced interpretations and foster coherence between different policy objectives/bodies of law.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
2 Treaty scope		
2.1 Definition of investment ... sets out the types of investment covered by the treaty	2.1.0 Offer coverage of *any* tangible and intangible assets in the host State (through an illustrative/open-ended list), directly or indirectly owned/controlled by covered investors.	A traditional open-ended definition of "investment" grants protection to all types of assets. It may have the strongest investment attraction effect but can end up covering economic transactions not contemplated by the Parties or investments/assets with questionable contribution to countries' development objectives. It may also expose States to unexpected liabilities.
	2.1.1 Compile an exhaustive list of covered investments and/or exclude specific types of assets from coverage, e.g.: • portfolio investment (with or without the definition of the term) • sovereign debt instruments • commercial contracts for the sale of goods or services • assets for non-business purposes • intellectual property rights not protected under domestic law.	States may want to tailor their definition of investment to target assets conducive to sustainable development by granting protection only to investments that bring concrete benefits to the host country, e.g. long-term capital commitment, employment generation, etc. To that effect, the Parties may wish to develop criteria for development-friendly investments.
	2.1.2 Require investments to fulfill specific characteristics, e.g. that the investment: • involves commitment of capital, expectation of profit and assumption of risk • involves assets acquired for the purpose of establishing lasting economic relations • delivers a positive development impact on the host country (i.e. Parties could list specific criteria according to their needs and expectations).	A treaty may further specifically exclude certain types of assets from the definition of "investment" (e.g. portfolio investment – which can include short-term and speculative investments – or intellectual property rights that are not protected under domestic legislation). A further option is to adopt a narrow, enterprise-based definition, offering protection only to enterprises owned or controlled (or with a certain minimum share held) by the investor. This would cover the most typical way to invest (including through M&A transactions) but would remove other types of assets from treaty coverage. States may also wish to explicitly exclude from coverage investments made with violations of the host State's domestic law.
	2.1.3 Use a narrow, exclusively enterprise-based definition, which covers only enterprises owned/controlled by an investor (i.e. no other assets are covered by the treaty).	
	2.1.4 Include a legality requirement, i.e. that investment must be made in "accordance with host country laws and regulations" (see also section 7 "Investor obligations and responsibilities").	
2.2 Definition of investor ... sets out the types of investors protected under the treaty	2.2.0 Offer coverage of any natural and legal persons originating from the other Contracting Party. With respect to legal entities, cover all those established in the other Contracting Party.	A broad definition of "investor" can result in unanticipated or unintended coverage of persons (natural or legal). For example, if a treaty determines the nationality of a legal entity solely on the basis of the place of incorporation, it creates opportunities for treaty shopping or free-riding by investors not conceived to be beneficiaries (e.g. a third-country/host-country investor may channel its investment through a "mailbox" company established in the territory of a Party, in order to obtain treaty protection). A related set of issues arises with respect to dual nationals where one nationality is that of the host State.
	2.2.1 Exclude certain categories of natural or legal persons from treaty coverage, e.g.: • investors with double nationality (of which one is the host country nationality) • permanent residents of the host country • legal entities that do not have their seat or any real economic activity in the home country.	

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
2.2 Definition of investor ... sets out the types of investors protected under the treaty (continued)	2.2.2 Include a denial-of-benefits clause that enables the host State to deny treaty protection to: • legal entities that are owned/controlled by third-country nationals or host State nationals and that do not have real economic activity in the home Party ("mailbox" companies) • legal entities owned/controlled by investors from countries with which the host country does not have diplomatic relations or those countries that are subject to an economic embargo Indicate whether denial-of-benefits clause can be invoked by a State "retrospectively", i.e. after the institution of ISDS proceedings.	There are various options to narrow the range of covered persons. For example, to eliminate the risk of abuse and enhance legal predictability, a treaty may add a requirement that a company must have its seat in the home State and carry out real economic activities there. The volume of investments channeled through "special purpose entities" may make such a clause increasingly relevant. An alternative to adding the above features to the definition of a covered investor is to use a denial-of-benefits clause that would allow denying protection to "mailbox" companies/"special purpose entities". To ensure the effectiveness of the denial-of-benefits clause in light of the contradictory arbitral practice, it may be useful to clarify that the clause can be invoked also *after* the commencement of arbitral proceedings.
2.3 Exclusions from the scope ... carve out specific policy areas and/or industries from the scope of the treaty	2.3.0 No exclusions. 2.3.1 Exclude specific policy areas from treaty coverage (from all or some treaty obligations), e.g.: • subsidies and grants • public procurement • taxation. 2.3.2 Exclude specific sectors and industries from treaty coverage (from all or some treaty obligations), e.g.: • essential social services (e.g. health, education) • specific sensitive industries (e.g. cultural industries, fisheries, nuclear energy, defence industry, natural resources).	The broader a treaty's scope, the wider its protective effect and its potential contribution to the attraction of foreign investment. However, a broad treaty also reduces a host State's right to regulate and flexibility and ultimately heightens its exposure to investors' claims. States can tailor the scope of the agreement to meet the country's development agenda. By carving out specific policy areas and sectors/industries from treaty coverage, States preserve flexibility to implement national development strategies (e.g. to grant preferential treatment to domestic investors or to impose performance requirements), or to ensure access to essential/public services. A less far-reaching approach would be to carve out sectors and policy areas (e.g. taxation) from most treaty obligations, but keep them subject to some (e.g. expropriation).
2.4 Temporal scope ... determines whether the treaty applies to investments and/or measures pre-dating the treaty	2.4.0 Extend the treaty scope to investments established both before and after the treaty's entry into force. 2.4.1 Limit temporal scope to investments made after the conclusion/entry into force of the treaty.	The treaty's scope will be widest if its application is extended to all investments, regardless of the time of their establishment in the host State. Another approach is to exclude already "attracted" (i.e. pre-treaty) investments: it could be seen as preventing free-riding by "old" investors but at the same time could result in discrimination between "old" and "new" investments. Moreover, this can create uncertainty with respect to re-investments by "old" investors.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
2.4 Temporal scope ... determines whether the treaty applies to investments and/or measures pre-dating the treaty (continued)	2.4.2 Clarify that the treaty shall not allow IIA claims arising out of any State acts which ceased to exist prior to the IIA's entry into force, even though they may still have an ongoing effect on the investor. 2.4.3 Clarify that the treaty shall not allow IIA claims based on measures adopted prior to conclusion of the treaty.	Policymakers should consider the effect of the treaty on State acts adopted prior to the treaty's entry into force, but with a lasting effect: "continuing" breaches (e.g. maintenance of an earlier legislative provision which comes into conflict with treaty obligations), individual acts whose effects continue over time (e.g. effect of a direct expropriation on the former owner of the asset) and "composite" acts (i.e. a series of actions or omissions which, taken together, are wrongful). It is useful to provide additional language to clarify whether the treaty would cover or exclude such lasting acts or effects. An express provision that precludes the application of the treaty to acts (or situations) that ceased to exist before the treaty's entry into force would enhance legal certainty, especially with regard to the period between the date of the treaty's signature and its entry into force. This approach would nevertheless keep open to challenge those pre-existing laws and regulations that come into contradiction with the new treaty once it enters into force. An alternative is to apply the treaty only to those measures that are adopted *after* the treaty's entry into force: this would automatically preclude all of the State's earlier non-conforming measures from being challenged, eliminating the need to identify and schedule such measures individually.
3 Admission ... governs the entry of investments into the host State (see also Part B "Pre-establishment")	3.1.0 Provide that investments are admitted in accordance with domestic laws of the host State. 3.1.1 No clause.	Most IIAs provide for admission of investments in accordance with the host State's national laws. Thus, unlike in the treaties that belong to the "pre-establishment" type (see also Part B "Pre-establishment"), in this case States do not give any international guarantees of admission and can change relevant domestic laws as they deem appropriate. However, the promise to admit investments in accordance with domestic law still has a certain value as it affords protection to investors in case a host State refuses admission in contradiction or by disregarding its internal laws.
4 Standards of treatment and protection		
4.1 National treatment (NT) ... protects foreign investors/investments against discrimination vis-à-vis domestic investors	4.1.0 Prohibit less favourable treatment of covered foreign investors/investments vis-à-vis comparable ("in like circumstances") domestic investors/investments, without restrictions or qualifications. 4.1.1 Set out criteria for determining whether investors/investment are "in like circumstances".	NT prevents nationality-based discrimination and guarantees foreign investors a level-playing field vis-à-vis comparable domestic investors. This standard is generally considered conducive to good governance. A clarification that the NT obligation requires comparison of investors/investments that are "in like circumstances" can go some way in safeguarding the right to regulate, but it can also raise questions about the specific criteria for comparison. Therefore, a treaty may need to set out the relevant criteria.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
4.1 National treatment (NT) ... protects foreign investors/ investments against discrimination vis-à-vis domestic investors (continued)	4.1.2 Circumscribe the scope of the NT clause (for both/all Contracting Parties), noting that it, e.g.: • subordinates the right of NT to a host country's domestic laws • reserves the right of each Party to derogate from NT. 4.1.3 Include country-specific reservations to NT (see also Part B "Pre-establishment"), e.g. carve out: • certain policies/measures (e.g. subsidies and grants, government procurement, measures regarding government bonds) • specific sectors/industries where the host country wishes to preserve the right to favour domestic investors • certain policy areas (e.g. issues related to minorities, rural populations, marginalized or indigenous communities) • measures related to companies of a specific size (e.g. SMEs). 4.1.4 Omit the NT clause.	In some situations, and in accordance with their development strategies, States may want to be able to accord preferential treatment to national investors/investments (e.g. through temporary grants or subsidies) without extending the same benefits to comparable foreign-owned companies. In this case, NT provisions need to allow flexibility to regulate for development goals. For example, countries that are reluctant to rescind the right to discriminate in favour of domestic investors can make the NT obligation "subject to their domestic laws and regulations". This approach gives full flexibility to grant preferential (e.g. differentiated) treatment to domestic investors as long as this is in accordance with the country's legislation. However, such a significant limitation to the NT obligation may be perceived as a disincentive to foreign investors. Also, omitting the NT clause from the treaty preserves the right to regulate but reduces the treaty's protective value. There can be a middle ground between full policy freedom, on the one hand, and a rigid guarantee of non-discrimination, on the other. For example, States may exempt specific policy areas or measures as well as sensitive or vital economic sectors/ industries from the scope of the obligation in order to meet both current and future regulatory or public-policy needs such as addressing market failures (this can be done either as an exception applicable to both Contracting Parties or as a country-specific reservation) (see also Part B "Pre-establishment").
4.2 Most-favoured nation (MFN) treatment ... protects foreign investors/ investments against discrimination vis-à-vis other foreign investors	4.2.0 Prohibit less favourable treatment of covered investors/investments vis-à-vis comparable ("in like circumstances") investors/investments of any third country. 4.2.1 Set out criteria for determining whether investors/investment are "in like circumstances". 4.2.2 Circumscribe the scope of the MFN clause, noting that MFN does not apply to more favourable treatment granted to third-country investors under, e.g.: • economic integration agreements • double taxation treaties • IIAs concluded prior to (and/or after) the conclusion of the IIA in question (e.g. if the latter contains rules that are less favourable to investors, as compared to earlier IIAs) • ISDS clauses/procedural rights.	The MFN provision is designed to prevent nationality-based discrimination and to ensure a level-playing field between investors from the IIA home country and comparable investors from any third country. However, competing objectives and implications may come into play when designing an MFN clause. While an MFN clause may be used to ensure upward harmonization of IIA treaty standards, it can also result in the unanticipated incorporation of stronger investor rights from IIAs with third countries and complicate conscious treatymaking. This is particularly the case if the MFN clause extends to pre-establishment (see also Part B "Pre-establishment") issues or when the treaty includes carefully balanced provisions that could be rendered ineffective by an overly broad MFN clause. A number of arbitral decisions have read the MFN obligation as allowing investors to invoke more investor-friendly provisions from third treaties, e.g. to incorporate standards not included in the base treaty, to benefit from higher protection standards compared to the ones found in the base treaty or to circumvent procedural (ISDS-related) requirements in the base treaty.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
4.2 Most-favoured nation (MFN) treatment ... protects foreign investors/ investments against discrimination vis-à-vis other foreign investors (continued)	4.2.3 Limit the application of the MFN clause to treatment accorded to foreign investors under domestic laws, regulations, administrative practices and de facto treatment. (Clarify that substantive obligations in other IIAs do not in themselves constitute "treatment", absent measures adopted by a State pursuant to such obligations.) 4.2.4 Include general carve-outs (applicable to both/all Parties) or country-specific reservations to MFN (see also Part B "Pre-establishment"), e.g. carve out: • certain policies/measures (e.g. subsidies, etc.) • specific sectors/industries • certain policy areas (e.g. issues related to minorities, rural populations, marginalized or indigenous communities or certain ethnic or cultural groups). 4.2.5 Omit the MFN clause.	Should a country wish to preclude the MFN clause from applying to any relevant international agreement, it can do so by excluding specific types of treaties from the scope of the MFN clause (see section 4.2.2) or, in a broader manner, by restricting the scope of the MFN clause to domestic treatment (see section 4.2.3). Carving out certain sectors/industries or policy measures through country-specific reservations, catering for both current and future regulatory needs, is an additional tool that allows managing the scope of the MFN clause in a manner targeted to the specific needs of individual IIA Parties (see also Part B "Pre-establishment"). A final option is to omit the MFN clause. While such an approach preserves a maximum of flexibility, omitting a standard that many consider to be one of the cornerstones of international economic law may raise questions. The MFN clause is a crucial provision for IIA reform. Failure to take appropriate action with respect to the MFN clause can undermine improved formulations of treaty provisions.
4.3 Fair and equitable treatment (FET) ... protects foreign investors/ investments against, e.g. denial of justice, arbitrary and abusive treatment	4.3.0 Give an unqualified commitment to treat foreign investors/investments "fairly and equitably". 4.3.1 Qualify the FET standard by reference to minimum standard of treatment of aliens under customary international law (MST/CIL). 4.3.2 Clarify or replace FET with an exhaustive list of State obligations, e.g. obligations not to: • deny justice in judicial or administrative proceedings • treat investors in a manifestly arbitrary manner • flagrantly violate due process • engage in manifestly abusive treatment involving continuous, unjustified coercion or harassment • infringe investors' legitimate expectations based on investment-inducing representations or measures. It may be provided that the Parties shall regularly, or upon request of a Party, review the content of the FET obligation.	FET is an important standard of treatment that merits particular attention: while it is considered to help attract foreign investors and foster good governance in the host State, almost all claims brought to date by investors against States have included an allegation of the breach of this all-encompassing standard of protection. Through an *unqualified* promise to treat investors "fairly and equitably", a country provides maximum protection for investors but also risks posing limits on its right to regulate, raising its exposure to foreign investors' claims and the resulting financial liabilities. Some of these implications stem from the fact that there is a great deal of uncertainty concerning the precise meaning of the concept, because the notions of "fairness" and "equity" do not connote a clear set of legal prescriptions and are open to subjective interpretations. A particularly problematic issue concerns the use of the FET standard to protect investors' "legitimate expectations", which may restrict the ability of countries to change policies or to introduce new policies that may have a negative impact on foreign investors.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
4.3 Fair and equitable treatment (FET) ... protects foreign investors/ investments against, e.g. denial of justice, arbitrary and abusive treatment (continued)	4.3.3 Clarify (with a view to giving interpretative guidance to arbitral tribunals) that: • the FET standard includes an obligation not to deny justice in criminal, civil or administrative proceedings • a breach of another provision of the IIA or of another international agreement cannot establish a claim for breach of the clause • the FET clause does not preclude States from adopting good faith regulatory or other measures that pursue legitimate policy objectives. 4.3.4 Reduce FET to a political commitment instead of using it as an operative legal standard. 4.3.5 Omit the FET clause.	Several options exist to address the deficiencies of an *unqualified* FET standard, each with its pros and cons. The reference to customary international law may raise the threshold of State liability and help to preserve States' ability to adapt public policies in light of changing objectives (except when these measures constitute manifestly arbitrary conduct that amounts to egregious mistreatment of foreign investors). However, the exact contours of MST/CIL remain elusive. An option in this respect would be for the Parties to clarify their understanding of the standard by noting, for instance, that its breach requires an act that is an outrage, is made in bad faith, or constitutes a wilful neglect of duty or an insufficiency so far short of international standards that every reasonable and impartial person would readily recognize its insufficiency. This would confirm a high threshold for finding a breach of the standard. Another solution would be to replace the general FET clause with an exhaustive list of more specific obligations. While agreeing on such a list may turn out to be a challenging endeavour, its exhaustive nature would help avoid unanticipated and far-reaching interpretations by tribunals. The treaty could create a mechanism for periodic review of this exhaustive list by the Parties in order to keep it comprehensive and in line with developments in arbitral practice. A further option is to include FET as a political commitment (e.g. by mentioning it in the preamble only). On the one hand, this would come close to "omitting" FET, as the clause would not be legally binding, but only have best endeavor character. At the same time, if part of the preamble, FET language could give guidance for the interpretation of other treaty obligations. Finally, an omission of the FET clause would reduce States' exposure to investor claims, but would also reduce the protective value of the agreement.
4.4 Full protection and security (FPS) ...requires host States to exercise due diligence in protecting foreign investments	4.4.0 Include a guarantee to provide investors/investments full protection and security. 4.4.1 Clarify the FPS clause by: • specifying that the standard refers only to "physical" security and protection • linking it to CIL (e.g. specifying that this obligation does not go beyond what is required by CIL) • providing that the expected level of police protection should be commensurate with the level of development of the country's police and security forces. 4.4.2 Omit the FPS clause.	Most IIAs include a guarantee of full protection and security (FPS), which is generally regarded as codifying CIL obligations to grant a certain level of police protection and physical security. However, some tribunals may interpret the FPS obligation so as to cover more than just police protection: if FPS is understood to include economic, legal and other protection and security, it can constrain government regulatory prerogatives, including for sustainable development objectives. Policymakers may follow a recent trend to qualify the FPS standard by explicitly linking it to customary international law or including a definition of the standard clarifying that it is limited to "physical" security. This would provide predictability and prevent expansive interpretations that could constrain regulatory prerogatives.

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4.5 Expropriation
... protects foreign investors in case of dispossession of their investments by the host country
	4.5.0 Provide that an expropriation must comply with/respect four conditions: public purpose, non-discrimination, due process and payment of compensation.
	
	4.5.1 Limit protection in case of indirect expropriation (regulatory taking) by:
	• establishing criteria that need to be met for indirect expropriation to be found, including e.g.:
	  • the economic impact of the government action (permanent and complete or near complete deprivation)
	  • the extent of government interference with distinct, reasonable investment backed expectations
	  • the character of the government action (e.g. whether it is discriminatory or disproportionate to the purpose of the measure under challenge)
	  • the effect of the government action (whether it has resulted in a direct economic benefit for the State)
	• defining in general terms what measures do not constitute indirect expropriation (non-discriminatory good faith regulations relating to public health and safety, protection of the environment, etc.)
	• clarifying that certain specific measures do not constitute an indirect expropriation (e.g. compulsory licensing in compliance with WTO rules).
	
	4.5.2 Omit a reference to indirect expropriation or explicitly exclude it.
	
	4.5.3 Specify the compensation to be paid in case of lawful expropriation:
	• appropriate, just or equitable compensation (e.g. based on an equitable balance between public and private interests, where the fair market value of investment is only one of the factors to be taken into account)
	• prompt, adequate and effective compensation, i.e. full market value of the investment ("Hull formula").
	(See also section 6.5 on remedies and compensation.)
		An expropriation provision is an important element of an IIA and merits particular attention. IIAs with expropriation clauses do not take away States' right to expropriate property, but protect investors against arbitrary or uncompensated expropriations, contributing to a stable and predictable legal framework, conducive to foreign investment.
		
		IIA provisions typically cover "indirect" expropriation, which refers to regulatory takings, creeping expropriation and acts "tantamount to" or "equivalent to" expropriation. Such provisions have been used to challenge general regulations with an alleged negative effect on the value of an investment. This raises the question of the proper borderline between expropriation and legitimate public policymaking (e.g. environmental, social or health regulations).
		
		To avoid undue constraints on a State's prerogative to regulate in the public interest, an IIA may set out general criteria for State acts that may (or may not) be considered an indirect expropriation. While this does not exclude liability risks altogether, it allows for better balancing of investor and State interests.
		
		Another option is to omit a reference to indirect expropriation from the IIA or explicitly exclude it from the treaty coverage. Depending upon drafting, the bare reference to "expropriation" in an IIA may be interpreted as subsuming both direct and indirect expropriation. In contrast, expressly excluding indirect expropriation IIA may be perceived as considerably reducing the protective value of the IIA as it would leave investors unprotected from certain types of indirect expropriation such as "creeping" or "disguised" takings (noting that these measures could be covered by the FET standard).
		
		The standard of compensation for lawful expropriation is another important aspect. The use of terms such as "appropriate", "just" or "fair" in relation to compensation gives room for flexibility in the calculation of compensation. States may find it beneficial to provide further guidance to arbitrators on how to calculate compensation and clarify what factors should be taken into account.

4.6 Protection from strife ... protects investors in case of losses incurred as a result of armed conflict or civil strife	4.6.0 Grant non-discriminatory (i.e. NT, MFN) treatment with respect to restitution/compensation in case of armed conflict or civil strife. 4.6.1 Guarantee – under certain circumstances – compensation in case of losses incurred as a result of armed conflict or civil strife as an absolute right (e.g. by requiring reasonable compensation).	IIAs often contain a clause on compensation for losses incurred under specific circumstances, such as armed conflict or civil strife. Some countries have expanded the coverage of such a clause by including compensation in case of natural disasters or *force majeure* situations. Such a broad approach increases the risk for a State to face financial liabilities arising out of ISDS claims for events outside of the State's control.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
4.6 Protection from strife ... protects investors in case of losses incurred as a result of armed conflict or civil strife (continued)	4.6.2 Define civil strife as not including "acts of God", natural disasters or force majeure. 4.6.3 Omit the protection-from-strife clause.	Most IIAs only confer a relative right to compensation on foreign investors, meaning that a host country undertakes to compensate covered investors in a manner at least equivalent to comparable host State nationals or investors from third countries. Some IIAs provide an absolute right to compensation obliging a State to restitute or pay for certain types of losses (e.g. those caused by the requisitioning of their property by government forces or authorities). The latter approach is more burdensome for host States but provides a higher level of protection to investors.
4.7 Transfer of funds ... grants the right to free movement of investment-related financial flows into and out of the host country	4.7.0 Grant foreign investors the right to freely transfer any investment-related funds (e.g. open ended list) into and out of the host country. 4.7.1 Provide an exhaustive list of types of qualifying transfers. 4.7.2 Include exceptions (e.g. temporary derogations): • in the event of serious balance-of-payments and external financial difficulties or threat thereof • where movements of funds cause or threaten to cause serious difficulties in macro-economic management, in particular, related to monetary and exchange rate policies. Condition these exceptions to prevent their abuse (e.g. application in line with IMF rules and respecting conditions of temporality, equity, non-discrimination, good faith and proportionality). 4.7.3 Reserve the right of host States to restrict an investor's transfer of funds in connection with the country's (equitable, non-discriminatory, and good faith application of its) laws, relating to, e.g.: • fiscal obligations of the investor/investment in the host country • reporting requirements in relation to currency transfers • bankruptcy, insolvency, or the protection of the rights of creditors • issuing, trading, or dealing in securities, futures, options, or derivatives • criminal or penal offences (e.g. imposing criminal penalties) • prevention of money laundering • compliance with orders or judgments in judicial or administrative proceedings.	IIAs virtually always contain a clause regarding investment-related transfers. The objective is to ensure that a foreign investor can make free use of invested capital, returns on investment and other payments related to the establishment, operation or disposal of an investment. However, an unqualified transfer-of-funds provision significantly reduces a host country's ability to deal with sudden and massive outflows or inflows of capital, balance-of-payments (BoP) difficulties and other macroeconomic problems. An exception increasingly found in recent IIAs allows States to impose restrictions on the free transfer of funds in specific circumstances, usually qualified by checks and balances (safeguards) to prevent misuse. Countries may also need to reserve their right to restrict transfers if this is required for the enforcement of the Party's laws (e.g. to prevent fraud on creditors etc.), again with checks and balances to prevent abuse.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
4.8 Transparency ... fosters access to information	4.8.0 Require Contracting Parties to promptly publish documents which may affect covered investments, including e.g.: • laws and regulations • procedures/administrative rulings of general application • IIAs. 4.8.1 Require countries to grant investment-related information upon request. 4.8.2 Require countries to publish in advance measures that they propose to adopt regarding matters covered by the IIA and to provide a reasonable opportunity for affected stakeholders (investors) to comment (prior-comment procedures). 4.8.3 Explicitly reserve host States' rights and/or encourage State Parties: • to implement policies placing transparency and disclosure requirements on investors • to seek information from a potential (or already established) investor or its home State • to make relevant information available to the public. Qualify with an obligation upon the State to protect confidential information. 4.8.4 No transparency clause.	Some IIAs include a clause requiring countries to promptly publish laws and regulations. Providing investors (prospective and established ones) with access to such information improves a country's investment climate. This might, however, also pose administrative difficulties for some countries that do not have the human resources and technological infrastructure required. The treaty may incorporate commitments to provide technical assistance to developing countries to support implementation. The administrative burden imposed by transparency obligations could be lessened by using phrases such as "to the extent possible". The few IIAs that contain so-called "prior-comment procedures" require an even higher level of action by governments and may expose States to lobbying and pressure in the process of developing those laws. Transparency obligations are often excluded from the scope of ISDS (see section 6.3.0). They can still be useful, given that any related problems can be discussed on a State-State level and addressed through technical assistance. Transparency provisions generally do not include any reference to transparency obligations applicable to investors. This contributes to the perception that IIAs lack i) corporate governance enhancing features; and ii) balance in the rights and obligations. IIAs could encourage States to strengthen domestic transparency requirements (e.g. including mechanisms for due diligence procedures).
4.9 Performance requirements ... regulate the extent to which host States can impose certain operational conditions on foreign investors/ investments	4.9.0 Preclude Contracting Parties from placing trade-related performance requirements (e.g. local content requirements) on investments operating in the goods sector (in accordance with/incorporating the WTO TRIMs Agreement). 4.9.1 Preclude Contracting Parties from placing performance requirements on investments, beyond trade-related ones, e.g. requirements to transfer technology, to achieve a certain level of R&D operations or to employ a certain percentage of local personnel (TRIMs +). 4.9.2 Preclude Contracting Parties from imposing performance requirements unless they are linked to the granting of incentives (usually in combination with the above TRIMs + option).	Performance requirements (PRs) refer to the imposition of conditions on businesses limiting their economic choices and managerial discretion (e.g. requirements to use locally produced inputs or to export a certain percentage of production). While PRs may be considered as creating economic inefficiencies, they can also be a potentially important tool for industrial or other economic development policies. From the transfer of technology to the employment of local workers, PRs can help materialize expected spill-over effects from foreign investment.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
Performance requirements ... regulate the extent to which host States can impose certain operational conditions on foreign investors/ investments (continued)	4.9.3 Include country-specific reservations to the TRIMs+ obligation, e.g. carving out: • specific sectors/industries (e.g. defence, infrastructure) • measures related to companies of a specific size. 4.9.4 No clause on performance requirements.	Thus, to reap the full benefits of foreign investment and to align investment policy with national development objectives, policymakers need to carefully consider the need for policy flexibility when devising clauses on PRs. This is important, even if the IIA simply refers to the WTO TRIMs Agreement (because even though this does not add any new obligations on States who are also WTO members, the incorporation of TRIMs into an IIA gives investors the opportunity to directly challenge a TRIMs violation through ISDS). It is particularly important when considering the prohibition of an extensive list of PRs beyond TRIMs (e.g. requirements to transfer technology or employ local workers). The relevant exceptions and reservations should be considered from the point of view of both current and future regulatory needs. Finally, even if the IIA does not contain a clause explicitly ruling out PRs, the NT clause would prohibit the discriminatory imposition of PRs on foreign investors only.
4.10 "Umbrella" clause ... establishes a commitment on the part of the host State to respect its obligations regarding specific investments (including in investment contracts)	4.10.0 Include a clause that requires each Party to observe any obligation (e.g. contractual) which it has assumed with respect to an investment of a covered investor. 4.10.1 Clarify that the clause covers only "written obligations" and that the obligations must be "entered into" with respect to specific investments. 4.10.2 Clarify that a breach of the "umbrella" clause may only result from an exercise of sovereign powers by a government (i.e. not an ordinary breach of contract by the State) and that disputes arising from such breaches shall be settled in the forum prescribed by the contract. 4.10.3 No "umbrella" clause.	An "umbrella" clause requires a host State to respect any obligation assumed by it with regard to a specific investment (for example, in an investment contract). The clause thus brings contractual and other individual obligations under the "umbrella" of the IIA, making them potentially enforceable through ISDS. By subjecting contractual violations to IIA arbitration an umbrella clause therefore makes it even more important for countries to have the technical capacity to carefully craft the respective contractual arrangements (e.g. when they enter into investment or concession contracts). The main difficulties with "umbrella" clauses are that they (1) effectively expand the scope of the IIA by incorporating non-treaty obligations of the host State into the treaty, which may increase the risk of being faced with costly legal proceedings, and (2) have given rise to conflicting interpretations by investor-State tribunals resulting in a high degree of unpredictability. One way to narrow the scope of the clause is to clarify that it covers only "written obligations" and that these obligations must be "entered into" with respect to specific investments – this would exclude oral assurances by State officials as well as obligations expressed through the laws of general application. Further, a treaty may specify the nature of acts that can be subject to the umbrella clause (exercise of sovereign powers) and identify the competent dispute settlement forum (where more than one is available). Finally, today many countries omit the "umbrella" clause from their IIAs. This means that an investor party to an investment contract would always have to show a breach of an IIA obligation, and not a breach of the contract.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
4.11 Personnel and staffing ... facilitates the entry, sojourn and employment of foreign personnel	4.11.0 Provide for the facilitation of entry, sojourn and issuing of work permits for nationals of one Party (or individuals regardless of nationality) into the territory of the other Party for purposes relating to an investment, subject to national immigration and other laws, covering: • all personnel, including families • only senior management and key personnel. 4.11.1 Ensure the right of investors to make appointments to senior management positions without regard to nationality. 4.11.2 Include country-specific reservations to the senior-management obligation (section 4.11.1), e.g. carve out: • certain policies/measures • specific sectors/industries • certain policy areas (minorities, indigenous communities) • measures related to companies of a specific size. 4.11.3 No clause.	Facilitating the entry and sojourn of foreign employees and the right to hire expatriate personnel (including senior management and members of the board of directors) can help to attract foreign investment. At the same time these provisions interact with host State's immigration laws – a particularly sensitive area of policymaking. It is important that host States retain control over their immigration policies or ensure coherence between relevant international and national regulations. Moreover, States may wish to encourage development-related spill-overs such as employment for domestic or indigenous workers and trickle-down effects with respect to technological knowledge (e.g. by requiring foreign investments to employ indigenous personnel or by limiting the number of expatriate personnel working for the investor). Carefully choosing the right normative intensity (e.g. opting for a best-efforts approach), and other mechanisms for preserving flexibility (e.g. ensuring the priority of national laws) are key.
5 Public policy and national security exceptions		
5.1 Public policy exceptions ... permit public policy measures, otherwise inconsistent with the treaty, to be taken under specified, exceptional circumstances	5.1.0 No public policy exceptions. 5.1.1 Include exceptions for domestic regulatory measures that aim to pursue legitimate public policy objectives, e.g. to: • protect human rights • protect public health • preserve the environment (e.g. biodiversity, climate change) • protect public morals or maintain public order • preserve cultural and/or linguistic diversity • ensure compliance with laws and regulations that are not inconsistent with the treaty • allow for prudential measures (e.g. to preserve the integrity and stability of the financial system) • ensure the provision of essential social services (e.g. health, education, water supply) • allow for broader safeguards, including on developmental grounds (to address host countries' trade, financial and developmental needs) • counter aggressive tax planning • protect national treasures of artistic, historic or archaeological value (or "cultural heritage").	To date few IIAs include public policy exceptions. However, more recent treaties increasingly reaffirm States' right to regulate in the public interest by introducing general exceptions. Such provisions make IIAs more conducive to sustainable development; they foster coherence between IIAs and other public policy objectives, and reduce States' exposure to claims arising from conflicts that may occur between the interests of a foreign investor and the promotion and protection of legitimate public-interest objectives. Exceptions allow for measures, otherwise prohibited by the agreement, to be taken under specified circumstances. General exceptions identify the policy areas for which flexibility is to be preserved in respect of all treaty protection standards. In order to lower the threshold for the use of exceptions by States, the provision may adjust the required link, or "nexus" between the measure and the alleged policy objective pursued by this measure. For example, instead of providing that the measure must be "necessary" to achieve the policy objective, the IIA could require that the measure be "designed" to achieve or "related" to the policy objective.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
5.1 Public policy exceptions ... permit public policy measures, otherwise inconsistent with the treaty, to be taken under specified, exceptional circumstances (continued)	5.1.2 Select the appropriate "nexus" between the measure and the policy objective pursued, e.g. that the measure must be: • "necessary" to achieve the alleged policy objective (strict test), or • "related to" ("aimed at", "directed to" or "designed to achieve") the policy objective (less strict test). 5.1.3 Prevent abuse of the exceptions by host States by providing that "exceptional" measures shall not be applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or investors, or a disguised restriction on international trade or investment. 5.1.4 Provide guidance for interpretation of exceptions, e.g. if a respondent State invokes a public policy exception in ISDS proceedings, the matter should be referred to the Contracting Parties for a joint binding determination of whether or not a measure falls within the scope of the exception.	In order to prevent abuse of exceptions, it is useful to clarify that "exceptional" measures must be applied in a non-arbitrary manner and not as disguised investment protectionism. Finally, to ensure the Parties' control over the interpretation of exceptions, the IIA may provide that questions of whether a measure at issue is justified by a public policy exception must be referred to the Parties for a joint determination.
5.2 National security exceptions ... permit national security measures, otherwise inconsistent with the treaty, to be taken under specified, exceptional circumstances	5.2.0 List the types of situations covered by the exception in order to determine its breadth. E.g. refer to measures: • to protect a State's essential security interests • to address serious economic crises • to maintain international peace and security (or taken in pursuance of States' obligations under the UN Charter for the maintenance of international peace and security) • relating to trafficking in arms or nuclear non-proliferation • in times of war or armed conflict or an emergency in international relations.	National security constitutes one of States' most vital interests. Its protection may sometimes conflict with investment obligations undertaken in IIAs. States may wish to include exceptions that allow them to digress from treaty obligations when this is required for the protection of their national security interests or for the maintenance of international peace and security. States can list the situations that fall under a security exception in a broad manner (e.g. essential security interests). Exceptions for national security may also be drafted in a more specific manner, by explicitly identifying when they can be invoked (e.g. to justify measures relating to trafficking in arms, adopted in times of war, relating to the implementation of national policies or international agreements for the non-proliferation of nuclear weapons). This latter approach has the disadvantage of restricting the situations in which a national security exception may be used but also offers more legal certainty. Given past experience with the security exception in ISDS cases, it may also be useful to clarify whether the exception encompasses economic security (e.g. whether it applies to measures adopted to combat an economic crisis).

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
5.2 National security exceptions ... permit national security measures, otherwise inconsistent with the treaty, to be taken under specified, exceptional circumstances (continued)	5.2.1 Decide whether the national security exception is self-judging or not (i.e. whether it can be subject to arbitral review, and what type of review).	Security exceptions in recent IIAs are usually drafted as "self-judging", allowing the invoking State to be the sole judge of whether the exception applies. This approach gives a wide margin of discretion to States, but reduces legal certainty for investors and potentially opens possibilities for abuse. The latter may be prevented by allowing tribunals the limited right of a good faith review (i.e. the tribunal can judge whether the exception is being manifestly misused). In contrast, exceptions designed as not self-judging imply that in case of a dispute, a tribunal retains full adjudicatory powers to determine whether the measure in question is allowed by the exception.
6 Dispute settlement		
6.1 State-State ... governs dispute settlement between the Contracting Parties	6.1.0 Establish that any unresolved IIA-related disputes can be submitted to State-State dispute settlement (arbitration). 6.1.1 Provide an option or require that the States engage in prior consultations and negotiations and/or resort to conciliation or mediation. 6.1.2 Provide for State-State dispute settlement as the only international means to resolve investment disputes under the IIA.	To date, State-State arbitrations under IIAs have been very rare. This is a natural consequence of including ISDS into IIAs (and investors themselves taking host States to arbitration) to complement the system of diplomatic protection. However, if a question about the meaning of a specific IIA obligation arises, and the Contracting Parties fail to resolve the uncertainty through consultations, a State-State arbitration can be a useful mechanism to clarify it. In this sense, State-State procedures retain their "supportive" function for ISDS. An alternative would be to offer State-State dispute settlement only (i.e. no ISDS). This would be in line with the principle that only States can bring claims under international law. However, this route may lead to a possible politicization of investment disputes, with all that this could entail (e.g. State discretion to pursue claims, elevating commercial disputes to the sphere of international relations, corporate lobbying).

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
6.2 Investor-State: scope and conditions of access ... determine the range of arbitrable disputes and the conditions of investors' access to ISDS	6.2.0 Define the range of disputes that can be subject to ISDS: • any investment-related disputes (regardless of the legal basis for a claim, be it IIA, contract, domestic law or other) • disputes arising from specifically listed instruments (e.g. IIAs, contracts, investment authorisations/licenses) • disputes regarding IIA violations only • States' counterclaims. 6.2.1 Circumscribe the scope of ISDS, e.g. by: • excluding certain treaty provisions and/or sensitive areas from ISDS • listing those issues/provisions to which ISDS applies (e.g. only to the expropriation provision) • prohibiting recourse to ISDS after a certain time period has passed from the events giving rise to the claim ("limitations period"), e.g. three years • denying ISDS access to investors who engage in "treaty shopping" or "nationality planning" through "mailbox" companies. 6.2.2 Introduce a local litigation requirement as a precondition to ISDS: • require investors to exhaust local remedies before accessing international arbitration (subject to a "futility" exception), or • authorize access to international arbitration if after the submission of a claim to domestic courts, the claim has not been resolved to investor's satisfaction within a certain period (e.g. 18 months). 6.2.3 Reserve State's consent to arbitration, so that it would need to be given separately for each specific dispute. 6.2.4 Omit ISDS (i.e. do not consent to investor-State arbitration in the treaty).	The ISDS mechanism allows foreign investors to sue a host State. IIAs vary as to the types of disputes that the Parties agree to submit to arbitration (they can range from alleged violations of the treaty to any investment-related disputes, whether treaty-based or not). Most IIAs allow investors to bypass domestic courts of host States and bring international arbitration proceedings (e.g. to constitute an ad hoc 3-person tribunal, most often at ICSID or under the UNCITRAL arbitration rules). The goal is to take the dispute out of the domestic sphere, to ensure independence and impartiality of the arbitrators, speed and effectiveness of the process and finality and enforceability of arbitral awards. Originally modeled on the system of ad hoc confidential commercial arbitration between private parties, today the ISDS system is subject to criticism (see WIR15). Defining – and circumscribing – the scope and conditions of investors' access to ISDS can help. The Parties to an IIA may choose to allow ISDS only for disputes regarding violations of the respective IIA. They may also choose to only subject the most fundamental IIA protections to ISDS (i.e. excluding certain treaty provisions) and/or to exclude sensitive areas from ISDS. This can be done, among others, for national security issues; including the review of incoming investments; measures to protect the environment, health and human rights; prudential measures; measures relating to transfer of funds (or respective IIA provisions); tax measure that do not amount to expropriation, or IIA provisions on transparency. A related option is to deny ISDS access to investors who engage in "treaty shopping" or "nationality planning" through "mailbox" companies that channel investment but do not engage in any real business operations in the home State (see also section 2.2.2 on denial-of-benefits clause). Introducing local litigation requirements would retain the option of ISDS, but make it a remedy of last resort (see also *WIR15*). Finally, the Parties may choose to omit investor-State arbitration and replace it, e.g. with domestic dispute resolution (i.e. judicial and administrative procedures) in the host State or with State-State procedures at the international level (see also section 6.1). Relying exclusively on domestic courts has particular merits for countries with sound legal systems, good governance and effective local courts. There are a number of pros and cons with this option, including that many jurisdictions do not allow local courts to apply IIAs directly to the resolution of disputes (see also *WIR15*).

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
6.3 Investor-State: procedural issues ... concern improvements of procedural nature	6.3.0 Introduce improvements and refinements to the arbitral process, e.g. by: • providing for more transparency, including by granting public access to arbitration documents (including settlement agreements) and arbitral hearings as well as allowing participation of interested non-disputing parties such as civil society organizations in ISDS proceedings • ensuring that arbitrators possess the requisite skills and are fully independent, impartial, free from conflicts of interest and "affordable" to the Parties (e.g. through a code of conduct) • "breaking the link" between the parties to the dispute and the arbitrators, e.g. by establishing a roster of qualified arbitrators and determining by lot the arbitrators who sit on a specific case • enhancing the Contracting Parties' role in interpreting the treaty, e.g. by establishing mechanisms for the provision of binding joint interpretations and facilitating interventions by the non-disputing Contracting Parties • including a mechanism for early discharge of manifestly unmeritorious claims to avoid wasting resources on full-length proceedings in such cases • providing for a more equitable distribution of costs and discouraging submission of unfounded claims, e.g. by expressly adopting the "loser pays" or the "costs follows the event" principles • preventing investors from seeking relief for the same violation in multiple forums, for example, by including a "waiver" ("no-U-turn") clause. 6.3.1 Strengthen the Contracting Parties' control over adjudication of sensitive issues by: • requiring tribunals to refer certain matters (e.g. those concerning taxation, prudential measures, scheduled reservations) for joint determination by the treaty Parties • if the Contracting Parties fail to issue a joint determination, require the issue to be referred to State-State dispute settlement.	The Parties to an IIA may focus on reforming the way arbitration proceedings are conducted while preserving the main features of the ISDS system. The goals of such modifications are to enhance the legitimacy of the ISDS system, enhance the Contracting Parties' control over the interpretation of their treaties and to streamline the process and make it more efficient. Enhanced transparency in ISDS proceedings could enable a more informed public debate as well as a more adequate representation of stakeholder interests, prevent non-transparent deals and stimulate balanced and well-reasoned arbitral decisions. A high level of transparency can be achieved by incorporating by reference the UNCITRAL Transparency Rules and by acceding to the UN Transparency Convention. The latter provides, in particular, that the UNCITRAL Transparency Rules will apply in ISDS proceedings brought under pre-existing IIAs of the relevant country (whether or not initiated under the UNCITRAL Arbitration Rules, i.e. also in addition to other arbitration rules). The Parties can also insert additional transparency features in their IIA, e.g. an obligation to make settlement agreements public. Raising the bar for arbitrators' qualifications, independence and impartiality requirements, and "breaking the link" between arbitrators and the disputing parties could improve ISDS legitimacy. Other procedural improvements, such as early discharge of manifestly unmeritorious claims, "loser pays" principle, "no U-turn" clause, consolidation of claims, and caps on arbitrator fees could help streamline the arbitral process and make it less expensive and more effective. States may further wish to reserve for themselves an active role in the interpretation of the IIA and over the adjudication of some sensitive issues. For example, Parties can introduce clauses that require tribunals to refer back to them certain issues for joint determination, and if the Parties fail to reach a joint determination, the matter may be referred to State-State dispute settlement (the latter may be better suited for sensitive issues of systemic importance, including because States are likely to use only those legal arguments with which they would feel comfortable in cases directed against them). The possibility for joint determinations would ensure a common interpretative framework and the ability of the Contracting Parties to limit the discretion of arbitrators.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
6.4 Other options for investment dispute settlement ... concern improvements of institutional nature and alternatives to the ISDS system	6.4.0 Modify the institutional set-up of ISDS, e.g. by: • introducing an appeals facility to undertake a substantive review and correct the arbitral tribunals' first instance decisions (in the IIA, include a reference to the potential establishment of such an appellate facility) • replacing the system of multiple ad hoc arbitral tribunals with a standing international investment court competent to hear all investment disputes arising from IIAs, with judges appointed or elected by States on a permanent basis and with an appeals chamber (in the IIA, include a reference to the potential establishment of such a court). 6.4.1 Promote the use of alternative dispute resolution (ADR) methods: • encourage resort to conciliation (e.g. ICSID or UNCITRAL conciliation rules) or mediation • agree to cooperate in developing dispute prevention mechanisms (including by creating investment ombudspersons or "ombuds" offices).	The institutional set-up of the ISDS system is among the main reasons of the legitimacy crisis the system is facing: the selection of arbitrators, their independence and impartiality, lack of transparency, inconsistent decisions and the lack of a possibility to appeal are concerns in this regard. IIA policymakers can improve the institutional set-up of ISDS, e.g. by establishing an appeals facility or an international investment court. These are not quick fixes but longer-term projects; however, IIAs can create a "socket" for such future institutions (e.g. a provision that opens the possibility to submit ISDS awards rendered under the treaty to a future appeals mechanism, should such a mechanism be created). An appellate mechanism could serve to enhance the predictability of treaty interpretation and improve consistency among arbitral awards. All this could significantly contribute to enhancing the political acceptability of ISDS and the IIA regime as a whole. Although an appeals body may be easier to set up in a bilateral context, its expected function of fostering legal consistency and predictability would be more pronounced in a pluri- or multilateral context. The creation of a permanent international investment court would bring investment disputes under the aegis of a public judicial institution. A standing court could enhance the legitimacy of the investor-State regime and help harmonise treaty interpretation. It could also strengthen the perceived and actual independence and impartiality of adjudicators, by establishing them as judges with security of tenure and exclusivity of function. A court could be competent for all investment disputes under an IIA, i.e. both investor-State and State-State proceedings. Legal standing or procedural rights could also be granted to other stakeholders (e.g. communities affected by investment projects). Such a court would work best in a plurilateral or multilateral context and may be unsuitable for bilateral IIAs. Parties may also consider promoting the use of alternative dispute resolution (ADR) methods, such as conciliation and mediation. If employed at the early stages of a dispute, ADR can help to prevent escalation of the conflict, preserve the investment relationship, and find a workable common-sense solution in a faster, cheaper and more flexible manner.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
6.5 Remedies and compensation ... determines remedies available in case of treaty breach and gives guidance on compensation	6.5.0 No clause. 6.5.1 Limit available remedies to monetary compensation and restitution of property (or to compensation only). 6.5.2 Provide that the amount of compensation shall be equitable in light of the circumstances of the case and set out specific rules on compensation for a treaty breach, e.g.: • exclude recoverability of punitive and/or moral damages • limit recoverability of lost profits (e.g. up to the date of award) • provide that compensation may not exceed the amount of capital invested plus interest at a commercially reasonable rate • ensure that the amount is commensurate with the country's level of development. (On compensation for expropriation, see section 4.5.3 above.)	Most IIAs are silent on the issue of remedies and compensation. In theory this permits arbitral tribunals to apply any remedy they deem appropriate, including, for example, an order to the country to modify or annul its law or regulation. Remedies of the latter type could unduly intrude into the sovereign sphere of a State and impede its policymaking powers; thus, Parties to an IIA may consider limiting available remedies to monetary compensation and restitution of property (or compensation only). As regards the amount of compensation for a treaty breach, customary international law of State responsibility requires compensation to be "full", which may include moral damages, loss of future profits and consequential damages. States may find it beneficial to provide guidance to arbitrators on applicable remedies and, similarly to the case of expropriation above, on calculation of compensation. If the Contracting Parties believe that certain types of damages should not be recoverable by investors (e.g. punitive or moral damages), they can explicitly rule them out in their IIA. They can also restrict recoverability of future profits and provide that compensation should cover a claimant's direct losses and not exceed the capital invested plus interest. However, such rules may be seen as undermining the protective quality of the IIA.
7 Investor obligations and responsibilities ... promote compliance by investors with domestic and/or international norms at the entry and operation stage	7.1.0 No clause. 7.1.1 Require that investors comply with host State laws at both the entry and the post-entry stage of an investment. Establish sanctions for non-compliance: • deny treaty protection to investments made in violation of the host State law • deny treaty protection to investments operating in violation of those host State laws that reflect international legally binding obligations (e.g. core labour standards, anti-corruption, environment conventions) and other laws as identified by the Contracting Parties • consider investor conduct when interpreting IIA protection standards • provide for States' right to bring counterclaims in ISDS arising from investors' violations of host State law.	Most IIAs only set out obligations for States. To correct this asymmetry, an IIA could also set out investor obligations or responsibilities. Noting the evolving views on the capacity of international law to impose obligations on private parties, IIA policymakers could consider a number of options, each with its advantages and disadvantages. These options (i) condition treaty protection upon certain investor behaviour; (ii) raise the obligation to comply with domestic laws to the international level (increasing its relevance in arbitration); and (iii) take a best-endeavour approach to universally recognised standards or applicable CSR standards. To this add options that iv) strengthen CSR through cooperative measures between treaty Parties and that v) encourage home countries to include CSR considerations in their investment promotion activities.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
Investor obligations and responsibilities ... promote compliance by investors with domestic and/or international norms at the entry and operation stage (continued)	7.1.2 Agree to strengthen domestic regulatory frameworks by incorporating international principles and standards related to social, human rights, health and environmental matters. 7.1.3 Encourage investors to comply with universally recognized standards such as the ILO Tripartite MNE Declaration and the UN Guiding Principles on Business and Human Rights, and to carry out corporate due diligence relating to economic development, social and environmental risks. Provide that non-compliance may be considered by a tribunal when interpreting and applying treaty protections (e.g. FET) or determining the amount of compensation due to the investor. 7.1.4 Encourage investors to observe applicable CSR standards: • without specifying the relevant CSR standards • by giving a list of relevant CSR standards (e.g. in an annex) • by spelling out the content of relevant CSR standards, e.g. encourage investors to contribute to human capital formation, local capacity building in close cooperation with the local community, creating employment opportunities and facilitating training opportunities for employees, and the transfer of technology. Provide that non-observance may be considered by a tribunal when interpreting and applying treaty protections (e.g. FET) or determining the amount of compensation due to the investor. 7.1.5 Call for cooperation between the Parties to promote observance of applicable CSR standards, e.g. by: • supporting the development of voluntary standards • promoting best-practice international CSR standards • building local industries' capacity for the uptake of voluntary standards • considering investors' adoption/compliance with voluntary standards when engaging in public procurement • conditioning the granting of incentives on the observance of CSR standards • promoting the uptake of CSR-related reporting (e.g. in the context of stock exchange listing rules). 7.1.6 Encourage home countries to condition the granting of outward investment promotion incentives (e.g. through export credit agencies and investment insurance) on an investor's socially and environmentally sustainable behaviour (see also 10.1.1 on investment promotion).	A far-reaching option is to include an obligation for investors to comply with laws and regulations of the host State at both, the entry and post-entry stage. While investors' observance of domestic laws can generally be enforced through national courts, including this obligation in an IIA could further improve means to ensure compliance, e.g. by way of denying treaty protection to non-complying investors (although this might go against the raison d'être of ISDS) or giving States a right to bring counterclaims in ISDS proceedings. Challenges may also arise from the fact that domestic laws are usually directed at local enterprises as opposed to those who own or control them and from the need to ensure that minor/technical violations should not lead to complete denial of treaty benefits (i.e. ensuring proportionality between the gravity of the investor's misconduct and the consequences). Finally, the elevation to a treaty level of the obligation to comply with domestic law should not affect the general principle that domestic laws must not be contrary to a country's international obligations – this can be made explicit in option 7.1.1 (e.g. by specifying that relevant domestic laws must not be inconsistent with the IIA and international law). Parties may also agree to strengthen domestic regulatory frameworks by introducing international CSR standards, e.g. related to social, human rights, health and environmental matters. This would mean that both foreign and domestic investors need to comply with these standards as part of the host States' domestic legal framework. Another option is to promote responsible investment through IIA language that encourages investors to comply with relevant universal principles or with applicable CSR standards. Such a best-endeavour clause would be given additional weight if the treaty instructs tribunals to take into account investors' compliance with relevant principles and standards when deciding investors' ISDS claims. Given the multitude of existing CSR standards, it may be useful to refer to specific documents such as the UN Global Compact. Cooperation can involve the work of a special committee set up under the IIA and tasked to discuss CSR-related issues. Finally, CSR-related initiatives can also have a home country dimension. An emerging policy development has home countries monitor or regulate the foreign activities of their companies. Such an effort can address, among others, issues related to human rights, the environment or corruption.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
Investor obligations and responsibilities ... promote compliance by investors with domestic and/or international norms at the entry and operation stage (continued)		All of the above options have their pros and cons. Although there are concerns that the "softer" approaches are unlikely to have a significant effect, they also carry certain advantages. For example, the softer the approach, the easier it will be to implement it and to make CSR part of the IIA. Moreover, soft approaches can have an important impact by "pushing the envelope" for conceptual debate and innovation in international investment policymaking.
8 Relationship to other agreements ... establishes a hierarchy in case of competing international norms	8.1.0 No clause. 8.1.1 Stipulate that if another international treaty, to which the Contracting States are parties, provides for more favourable treatment of investors/investments, that other treaty shall prevail in the relevant part. 8.1.2 Stipulate that in case of a conflict between the IIA and a host State's international commitments, such conflicts should be resolved in accordance with customary international law, including with reference to the Vienna Convention on the Law of Treaties. 8.1.3 Stipulate that in case of a conflict between the IIA and a host State's international commitments under a multilateral agreement in another policy area, such as environment and public health, the latter shall prevail: • set out a closed or open-ended list of treaties that are given priority if a conflict with the IIA arises. 8.1.4 Provide for a referral of matters relating to potential conflicts between treaties to the Parties (or their institutional mechanism) for a joint binding determination (see section 6.3.1 above).	IIAs usually provide that more favourable treatment of investors granted under another international treaty (e.g. a multilateral treaty to which both IIAs signatories are Parties) would take precedence. It is much less usual to address the relationship between an IIA and a treaty that governs a different policy area (e.g. protection of environment, human rights, etc.). Addressing this issue would encourage arbitral tribunals to take into account these other international commitments and ensure, as much as possible, interpretation of IIA provisions in harmony with other branches of international law. An IIA may reaffirm the Parties' commitments under other international treaties, so that the IIA is read in line with their obligations under international law in other areas. Explicitly setting out a list of international agreements that are given priority over the IIA would provide legal certainty. A closed list would not account for future treaty-making but it could be made subject to regular reviews. Counties may also include general exceptions in favour of certain public policy objectives covered by the relevant international law obligations (see section 5.1.1 above). Referring inter-treaty conflicts to the Contracting Parties would allow the "owners" of the treaties to decide which instrument takes priority in given circumstances and would ultimately contribute to the regime's coherence.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
9 Not lowering of standards clause ... discourages Contracting Parties from attracting investment through the relaxation of labour or environmental standards	9.1.0 No clause. 9.1.1 Include environmental, human rights and labour clauses that: • include a commitment to refrain from relaxing domestic environmental and labour legislation to encourage investment (expressed as a binding obligation or as a soft law clause) • reaffirm commitments under, e.g. international environmental agreements or with regard to international health standards, internationally recognized labour rights or human rights. 9.1.2 Encourage cooperation between treaty Parties to provide enhanced environmental, human rights and labour protection and hold expert consultations on such matters.	There is a concern that international competition for foreign investment may lead some countries to lower their environmental, human rights and labour standards and that this could lead to a "race to the bottom" in terms of regulatory standards. Some recent IIAs include language to address this concern. "Not lowering standards" provisions, for example, prohibit or discourage host States to compromise on environmental and labour protection for the purpose of attracting foreign investment. In doing so, the IIA goes beyond its traditional role of investment protection and pursues the goal of maintaining a regulatory framework that would be conducive to SD. While current IIAs often exclude "not lowering standards" clauses from ISDS or dispute settlement as such, it may be beneficial to foster consultations on this issue, including through institutional mechanisms, so as to ensure that the clause will effectively be implemented.
10 Investment promotion ... aims to encourage foreign investment through additional means beyond investment protection provisions in IIAs	10.1.0 No clause. 10.1.1 Establish provisions encouraging investment flows, with a special emphasis on those which are most beneficial in light of a country's development strategy. Possible mechanisms include, e.g.: • encourage home countries to provide outward investment incentives, e.g. investment guarantees, possibly conditioned on the sustainable development enhancing effect of the investment and investors' compliance with universal principles and applicable CSR standards (e.g. OECD Guidelines for MNEs) • organise joint investment promotion activities such as exhibitions, conferences, seminars and outreach programmes • exchange information on investment opportunities • ensure regular consultations between investment promotion agencies • provide technical assistance programmes to developing host countries to facilitate FDI flows. 10.1.2 Establish an investment ombudsperson/facilitator in each Contracting Party with a mandate to, e.g.: • address suggestions or complaints by investors and their home States • take action to prevent, manage and resolve disputes • provide information on relevant legislative and regulatory issues • promote greater awareness and transparency.	While host States conclude IIAs to attract development-enhancing investment, the investment attraction effect of IIAs is mostly indirect (through the protection offered to foreign investors). Only a few IIAs include special promotion provisions to encourage investment flows and increase investors' awareness of investment opportunities (e.g. by exchanging information or joint investment-promotion activities). "Promotion" provisions are usually "soft" (unenforceable), and their ultimate usefulness largely depends on the will and action of the Parties. Creating a joint committee responsible for investment promotion may help to operationalize the relevant provisions. Through such committees, the Parties can set up an agenda, organize and monitor the agreed activities and take corrective measures if necessary. Joint investment promotion provisions can also foster cooperation between national investment promotion agencies (IPAs), between outwards investment agencies (OIAs) in home countries and IPAs in host countries, or between IPAs and trade promotion agencies. This could also build on the promotion-related experiences of regional economic cooperation initiatives, and include regional infrastructure projects, regional industrial zones and regional SDG investment compacts.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
Investment promotion ... aims to encourage foreign investment through additional means beyond investment protection provisions in IIAs (continued)	10.1.3 Strengthen promotion activities through a joint investment promotion body (see also 11.1.1 below). It could e.g.: • identify new investment opportunities • monitor the implementation of specific facilitation measures (e.g. related to the granting of business visas or dismantling bureaucratic/regulatory obstacles) • address specific concerns of investors (e.g. based on a report by an ombudsperson) • design, implement and monitor progress on thematic work plans (e.g. on green investment, promotion of linkages, issues related to SMEs, global value chains, etc.) • facilitate activities mentioned in sections 10.1.1 and 10.1.2. 10.1.4 Include a subrogation clause.	States can also establish an investment ombudsperson to oversee implementation of the IIA and they can strengthen promotion activities through a joint investment promotion body (see also 11.1.1). The mechanism of subrogation supports investment promotion by ensuring the effective functioning of investment insurance schemes maintained by home States, or their respective agencies, to support their outward FDI. If the insurer covers the losses suffered by an investor in the host State, it acquires the investor's right to bring a claim and may exercise it to the same extent as, previously, the investor. Subrogation makes it possible for the insurer to be a direct beneficiary of any compensation by the host State to which the investor would have been entitled.
11 Institutional set-up ...establishes an institutional platform/ collaboration between the Contracting Parties	11.1.0 No clause. 11.1.1 Set up an institutional framework under which the Parties (and, where relevant, other IIA stakeholders such as investors, local community representatives, etc.) shall cooperate and hold meetings from time to time, to foster the implementation of the agreement with a view to maximising its contribution to SD. More specifically, this can include a commitment to: • issue interpretations of IIA clauses • review the functioning of the IIA • discuss and agree upon modification of commitments (in line with special procedures) and facilitate adaptation of IIAs to the evolving SD policies of State Parties, e.g. through renegotiation • organize and review investment promotion activities, including by involving investment promotion agencies, exchanging information on investment opportunities, organizing seminars on investment promotion • discuss the implementation of the agreement, including by addressing specific bottlenecks, informal barriers, red tape and resolution of investment disputes • regularly review Parties' compliance with the agreement's not-lowering standards clauses • provide technical assistance to developing Contracting Parties to enable them to engage in the institutionalized follow-up to the treaty • identify/update relevant CSR standards and organize activities to promote their observance.	While countries have concluded numerous IIAs, generally, there has been little follow-up to ensure that IIAs are properly implemented and kept up-to-date. Recent IIAs have started to include provisions for permanent institutional arrangements that perform a number of specific functions. For example, agreed interpretation can help ensure consistency in arbitral awards. Similarly, deliberations can ensure informed decision making on further investment liberalization, or prolonging or amending IIAs. This can help maximize the contribution of IIAs to SD, for example, by monitoring the development implications of IIAs and by engaging in dispute prevention activities and CSR promotion. A clear treaty mandate facilitates the implementation of the listed activities. Furthermore, it provides a forum to reach out to other relevant investment stakeholders including investors, local community representatives and academia.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
12 Final provisions ... define the duration of the treaty and its possible prolongation	12.1.0 Specify the temporal application of the treaty (e.g. 10 or 20 years) with quasi-automatic renewal (the treaty is renewed unless one of the Parties notifies the other(s) of its intention to terminate). 12.1.1 State a specific duration of the treaty but stipulate that renewal is based on a written agreement of both Parties on the basis of a (joint) informed review of the IIA. 12.1.2 Include a "survival" clause which guarantees that in case of unilateral termination of the treaty, it will remain in effect for a number of years after the termination of the treaty (e.g. for another 5, 10 or 15 years) with respect to investments made prior to the termination. 12.1.3 Do not specify minimum initial temporal duration but allow for termination of the treaty at any time upon the notification of either Party.	There is an emerging concern about aging treaty networks that may eventually be unsuitable for changing economic realities, novel or emerging forms of investment and new regulatory challenges. This partly results from the fact that IIAs often provide for a fixed period of duration and quasi-automatic renewal (in an attempt to provide a stable investment regime). An alternative would be to provide for renewal if both Parties explicitly agree to it in writing after a joint review of the treaty and an assessment of its impact on FDI flows and any attendant development implications. This exercise would help to assess whether the treaty is still needed and whether any amendments are required. Another issue concerns the protection of investors after the IIA's termination. An IIA may include a "survival" clause, which effectively locks in treaty standards for a number of years after the treaty is terminated. While it provides longer-term legal security for investors, which may be necessary for investors with long-term projects involving substantial commitment of capital (e.g. in the extractive industries), it may limit States' ability to regulate their economies in accordance with new realities (especially if the treaty's provisions do not grant sufficient policy flexibility). Negotiators may opt for a balanced solution by ensuring that the "survival" clause is not overly long.

UNCTAD's Investment Policy Framework for Sustainable Development

POLICY OPTIONS FOR IIAS

PART B. PRE-ESTABLISHMENT

Policy options in Part B are supplementary to those in Part A and can be used by countries wishing to extend their IIA to pre-establishment matters. To the extent possible, policy options are ranked from the one providing the prospective host State with most flexibility for regulating the admission of foreign investors, to the option providing the least flexibility.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
1 Overall approach to pre-establishment … determines whether and how the treaty applies to the acquisition and establishment of investments	1.1 **No binding pre-establishment provisions (i.e. post-establishment model)** • not include any commitments on pre-establishment • include a best-endeavour/best-efforts clause that cannot be enforced against a host State • include a provision for future negotiations only • include a provision that admission of investments shall be in accordance with national law. 1.2 Positive-list approach 1.2.1 **Positive list without reservations** Extend selected IIA obligations to the "establishment, acquisition and expansion" of investments in specifically listed sectors/industries. The relevant IIA obligations may include e.g.: • national treatment (see Part A section 4.1) • MFN treatment (see Part A section 4.2) • market access[a/] • performance requirements (see Part A section 4.9) • nationality requirements for senior management and board members (see Part A section 4.11).	It is an important policy choice to decide whether to extend the IIA coverage to pre-establishment (PE) matters and, if so, to find the right balance between binding international commitments and domestic policy flexibility. In terms of their depth, an IIA's PE commitments can (i) lead to a genuine liberalization, i.e. market opening, (ii) "lock in" the existing regulatory conditions, or (iii) fall below the current level of openness so that the State concerned retains latitude to tighten PE conditions if it so wishes. In the same treaty, PE commitments can be deeper for some economic sectors/industries and shallower for others. In fact, a country can have a fully open investment regime, without any international commitments to that effect. Should a country wish to retain its full right to regulate regarding the acquisition and establishment of foreign investors, abstaining from making any PE commitments is the most straight-forward option. Should countries decide to negotiate an IIA with a PE dimension, choosing between the positive- and the negative-list approach is the first step in designing their PE commitments. The positive-list approach offers selective liberalization by way of a "positive list" of sectors/industries in which investors will enjoy PE rights under the relevant treaty obligations. The "positive list" approach places limits on governments' regulatory prerogatives only for those sectors/industries that are included in the list. It also can preserve the right to regulate in committed sectors, as Parties may make reservations for non-conforming measures (NCMs). Such reservations can apply to existing or future NCMs. When aiming to preserve regulatory space, making PE commitments on a positive-list basis is usually considered to be safer and more development friendly, particularly when countries' regulatory frameworks are still at an evolving stage.

[a/] Prohibition of imposing certain limitations on the participation of foreign capital, e.g. in terms of maximum percentage limits on foreign shareholding; limitations on the number of establishments (quotas, monopolies, exclusive rights); limitations on the total value of transactions or assets.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
Overall approach to pre-establishment … determines whether and how the treaty applies to the acquisition and establishment of investments (continued)	1.2.2 **Positive list with reservations ("hybrid" approach) (section 3)** In committed sectors/industries, schedule reservations (e.g. non-conforming measures) to relevant treaty obligations. Reservations can be made • to preserve (maintain) existing non-conforming measures ("standstill") and/or • to allow adoption of new conforming measures in the future. 1.3 **Negative-list approach** 1.3.1 **Negative list without reservations**[a/] Extend selected IIA obligations to the "establishment, acquisition and expansion" of investments in all sectors/industries except those explicitly excluded. The relevant IIA obligations may include e.g.: • national treatment (see Part A section 4.1) • MFN treatment (see Part A section 4.2) • market access[b/] • performance requirements (see Part A section 4.9) • nationality requirements for senior management and board members (see Part A section 4.11). 1.3.2 **Negative list with reservations (section 3)** In committed sectors/industries, schedule reservations (e.g. non-conforming measures) to relevant treaty obligations. Reservations can be made: • to preserve (maintain) existing non-conforming measures ("standstill") and/or • to allow adoption of new conforming measures in the future. 1.4 **Full right to establishment** Grant the full right of establishment to ensure unrestricted market access for foreign investors (subject only to restrictions on general public policy/security grounds).	Under the negative-list approach, investors benefit from PE commitments in all sectors/industries except in those that are explicitly excluded (negative list). Such a "negative list" provides a comprehensive inventory of non-conforming measures, offers regulatory transparency and "captures" remaining barriers to investment. Compared to the positive-list approach, negative listing often – although not necessarily – results in a higher number of committed (i.e. liberalized) sectors. It is considered particularly suitable for Parties that already have a largely open investment regime, that wish to send a political signal about a welcoming investment climate and/or that aim at a comprehensive and rapid liberalization. At the same time, the negative-list approach is demanding in terms of resources: it requires a thorough audit of existing domestic policies. It may be better suited for countries that have a sophisticated domestic regulatory regime and sufficient institutional capacity for properly designing and negotiating their schedules of commitments. The full right of establishment is the most far-reaching policy option that provides for the highest degree of liberalization. It is usually based on the principle of reciprocity and forms part of a broader integration agenda such as in the European Union or the Andean Community. It usually does not allow for making sector- or measure-specific reservations, but is usually subject to general and security exceptions.

[a/] The exclusion of sectors/industries is not considered a "reservation" for the purposes of this Part. "Reservations" refer to those made within committed sectors (see section 3 below).

[b/] Prohibition of imposing certain limitations on the participation of foreign capital, e.g. in terms of maximum percentage limits on foreign shareholding; limitations on the number of establishments (quotas, monopolies, exclusive rights); limitations on the total value of transactions or assets.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
2 Ratcheting mechanism … determines whether unilateral domestic liberalization measures are "locked in" by the IIA	2.1 **No ratcheting mechanism** Do not "lock in" unilateral (domestic) liberalization measures introduced by a Party in committed sectors/industries after the treaty enters into force. 2.2 **Include a ratcheting mechanism** "Lock in" all unilateral (domestic) liberalization measures introduced by a Party in committed sectors/industries after the treaty enters into force, i.e. prohibit reversal of unilateral liberalization measures. Such a ratcheting mechanism can be "partial", i.e. apply to selected sectors or treaty obligations only.	Ratcheting preclude countries from reversing liberalization measures taken after the entry into force of the treaty. When an IIA has a ratcheting mechanism, national level policy changes to NCMs can only go in the direction of becoming more favourable to investors. Ratcheting only applies to committed sectors/industries. Including a "ratcheting mechanism" may be appealing for countries wishing to signal their commitment towards further (unilateral) liberalization. At the same time, ratcheting poses constraints on the right to regulate. It raises particular challenges for sectors where regulatory regimes and enforcement institutions are nascent and where future effects of liberalization are unclear. Countries that "experiment" with liberalization and regulatory change may find it beneficial to not include a ratcheting mechanism into their IIAs or to introduce it after an extended phase-in period. This leaves them free to reverse the course of liberalization as long as such reversals do not result in a degree of liberalization that is below the level enshrined in the IIA.
3 Reservations … preserve the right to maintain existing non-conforming measures and/ or adopt new non-conforming measures in the future	3.1 **General carve-outs applicable to both/all treaty Parties** Allow Parties to maintain: • all national measures that are non-conforming to IIA provisions at the time of the treaty's entry into force ("general grandfathering" of all non-conforming measures) • all current and future measures taken by certain government levels (e.g. subnational and/or local) • more favourable treatment for members of economic integration organizations (REIO exception to the MFN obligation, see section 4.2.2 in Part A "Post-establishment"). 3.2 **Country-specific reservations** Make reservations to committed sectors/industries under the positive-list ("hybrid") or the negative-list approach. 3.2.1 **Sectoral reservations** Include reservations that apply to certain sectors/industries, e.g.: • full exclusions of sectors or industries • limits on foreign ownership and control, including equity ownership caps • prescription of sector-specific performance requirements • permission of certain company-specific monopolies.	Regardless of whether IIA Parties opt for a positive- or negative-list approach, they may make reservations in committed sectors. This can be general carve-outs, usually included in the main treaty text and applying to both (all) IIA Parties, or country-specific reservations, that apply to the country that lists them in its respective schedule or reservations. Reservations can maintain existing NCMs ("standstill") and/or to retain the right to adopt new NCMs in the future (see sections 1.2.2 and 1.3.2). Reservations can be applicable to both/all Parties (general carve-outs) or be country-specific. Countries can combine the different approaches as it fits their national policy/development objectives (and their negotiating partners' preferences). General carve-outs, i.e. those usually found in the main treaty text (not in schedules of reservations), and applying to both/all Parties, do not require Parties to list the specific measures for which regulatory flexibility is being preserved. General carve-outs can be combined with an illustrative list of non-conforming measures for purposes of regulatory transparency. One option is to preserve, in a "wholesale" manner, any and all existing non-conforming measures from the PE obligations (without listing NCMs one-by-one). If combined with a "ratcheting" mechanism (section 2.2), this approach would have the effect of not liberalizing any sector at the time of treaty signature, but enshrining the status quo and locking in all future unilateral liberalization. Another approach is to carve out any and all existing and future measures adopted at a certain level of government (e.g. subnational and/or local). The extent and importance of policy space preserved through this reservation depends on the distribution of competences between the different levels of government in the State concerned (constitutional set-up).

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
Reservations … preserve the right to maintain existing non-conforming measures and/ or adopt new non-conforming measures in the future (continued)	3.2.2 **Policy-area reservations** Include reservations for specific policy areas, e.g.: • transfer or sale of State equity interests or assets (privatization) • access to land and natural resources (e.g. allow caps or prohibitions of sales, allow permission or approval procedures) • government support measures (e.g. subsidies and grants) • government support for minorities/disadvantaged groups • government support for vulnerable industries and SMEs. 3.2.3 **Government procedure reservations** Include reservations that explicitly permit e.g.: • certain special screening and approval procedures for foreign investments • special registration and/or licensing procedures • admission subject to "economic needs test" (based on an assessment of "needs" in the domestic market). 3.2.4 **Other reservations** Include other reservations, e.g.: • prescription of minimum investment requirements • right to impose higher fees on foreign investors. 3.3 **Additional flexibility mechanisms for reservations** 3.3.1 **Subsequent altering of reservation schedules** Preserve Parties' right to subsequently add to their schedules non-conforming measures: • in new/emerging sectors, products or activities • in all committed sectors, until a certain date after the entry into force of the agreement • in all committed sectors, at any time, as long as this "does not alter the overall level of commitments" under the treaty.	Country-specific schedules, (i.e. those usually attached to the IIA and binding on the IIA Party drawing up the respective schedule), can be used to record a wide variety of different reservations and to preserve regulatory flexibility for a number of different measures and purposes. Sectoral reservations can apply to a whole sector or to a sub-sector, industry, activity or even a company. States may wish to preserve regulatory space for sectors/industries, e.g. because of (i) their social importance (e.g. fishing, farming or public services, such as health, provision of water or education), (ii) their tight regulation (e.g. energy, oil or gas or other monopolistic sectors), or (iii) other sensitivities (e.g. air and space industries, defense, culture, or natural resources related sectors). Sectoral reservations can cover existing and future restrictive/non-conforming measures, or be limited to existing measures (e.g. specific equity ownership caps, quotas, exclusive rights and other restrictive or discriminatory measures). Full sectoral reservations can help a Party to retain a large degree regulatory freedom in the respective sector/industry on PE matters, and result in a situation almost equivalent to not committing a sector. Policy area reservations preserve flexibility (i) in a certain domain of policymaking (e.g. privatization, land), (ii) for use of certain policy instruments (e.g. subsidies), (iii) to support certain types of beneficiaries (e.g. minorities). A reservation for privatization, for example, can preserve flexibility, including for attaching conditions (e.g. performance requirements) to such transactions. Reservations related to land and natural resources have policy relevance, because of national security issues arising from the strategic location of land (e.g. land in sensitive border areas or at ocean fronts), strategic access to natural resources (e.g. minerals, oil, water, biodiversity), or questions arising from the size of countries/regions (e.g. preservation of access to real estate for the resident population). IIA reservations frequently preserve countries' ability to provide government support (subsidies and grants). Depending on the formulation, this can cover: (i) different types of financial support (e.g. subsidies, grants, loans, foreign aid, guarantees, insurances); (ii) support measures by a government entity (including at sub-federal level), by a State enterprise; and/or (iii) support measures aimed at various policy objectives/for various beneficiaries (e.g. SMEs, disadvantaged economic actors, economic actors in a specific region etc.).

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
Reservations … preserve the right to maintain existing non-conforming measures and/ or adopt new non-conforming measures in the future (continued)	3.3.2 **Additional time for negotiating reservation schedules** Postpone the entry into force of pre-establishment obligations until Parties agree on their respective schedules of reservations.	Support for minorities/disadvantaged groups can include historically disadvantaged groups, ethnicities, minorities, economically challenged actors, indigenous peoples, etc. Examples of NCMs include: (i) reserving industry-specific or general quotas for beneficiaries; (ii) preferential treatment in the granting of licenses or access to resources; (iii) preferential treatment regarding their activities in a particular sector; or (iv) imposing minimum investment requirements on foreign investors (i.e. effectively reserving small-scale activities for beneficiaries). Government procedure reservations preserve the right of host States to subject foreign investors/investments to certain (special or additional) procedures. For example, a special screening procedure for foreign investments can apply to investments above certain thresholds (size of investment, size of assets acquired, size of shareholding acquired) and/or in specific sectors. Finally, Parties can devise flexibility mechanisms that, for example, allow them to change their reservations lists (subsequently to the adoption of the IIA), or that grant them a longer time frame for negotiating/designing their reservations (following the conclusion of the "main" IIA negotiations).
4 Enforcement of pre-establishment obligations … determines how pre-establishment obligations can be enforced and interpreted	4.1 Include rules on enforcement of pre-establishment obligations, e.g.: • apply all of the IIA's enforcement mechanisms to PE commitments, i.e., subject them to both, State-State and investor-State dispute settlement • exclude pre-establishment disciplines from the scope of ISDS, i.e. subject them only to State-State dispute settlement • provide that Parties have the authority over the interpretation of reservation schedules (i.e. oblige tribunals to refer relevant matters for Parties' joint determination).	Given the sensitivities surrounding PE and ISDS, some IIAs prevent investors from bringing ISDS cases against host governments on these issues. A country may exclude from ISDS: (i) all PE-related matters, (ii) only those arising under selected obligations (e.g. only NT), or (iii) only government approval decisions for incoming investments (relevant for countries where such procedures exist). Usually State-State dispute settlement then remains available to resolve disputes on PE matters. Another option is to give Parties authority over the interpretation of reservation schedules. Governments may prefer to have leeway for finding political solutions, e.g. through a joint committee that determines the scope of reservations by diplomatic means, or through negotiation of alternative solutions.
5 Other treaty provisions … provide flexibility or circumscribe the scope of the treaty as a whole (including its pre-establishment obligations)	5.1 Preserve policy space and regulatory flexibility for pre-establishment issues through relevant general provisions of the IIA, e.g.: • exclude certain sensitive sectors and policy areas from the scope of the treaty as a whole (see section 2.3 in Part A "Post-establishment") • include public policy and/or national security exceptions (see section 5 in Part A "Post-establishment") • include a balance-of-payments exception to the free transfer obligation (see section 4.7.2 in Part A "Post-establishment").	In addition to the approach taken to making PE commitments per se, the extent/depth of the latter is also shaped by the overall coverage of the treaty and the IIA's mechanisms for preserving the right to regulate (e.g. public policy exceptions). For example, if the IIA does not apply to a certain sector/industry (e.g. social services) or to a specific policy area (e.g. subsidies), then the IIA's PE obligations also do not apply to that sector/area either. Techniques for circumscribing treaty scope and their respective pros and cons are discussed in the relevant sections of the UNCTAD Investment Policy Framework.

PART C. SPECIAL AND DIFFERENTIAL TREATMENT (SDT)

SDT provisions could be an option where Contracting Parties to an IIA have significantly different levels of development, especially when one of the Parties is a least-developed country. SDT presupposes that a treaty can be built asymmetrically, i.e. treaty obligations may differ between the Contracting Parties.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
1 Asymmetrical obligations ... enable imposition of less onerous obligations on a less developed Contracting Party	**1.1.0 Delayed implementation of obligations** Introduce a timetable for implementation of IIA commitments with longer time-frames for a less developed Party. Could be used for, e.g.: • pre-establishment obligations • national treatment • transfer of funds • performance requirements • transparency • investor-State dispute settlement. **1.1.1 Reduced normative intensity** Replace binding obligations with best-endeavour obligations for a less developed Party. Could be used for, e.g.: • pre-establishment obligations • national treatment • performance requirements • transparency.	SDT provisions give expression to the special needs and concerns of developing and particularly least-developed countries (LDCs). Largely absent from existing IIAs, this principle is expressed in numerous provisions of the WTO agreements and has found its way into other aspects of international law such as the international climate change framework. SDT may be necessary in order to ensure that a less developed Party to a treaty does not undertake obligations that would be too burdensome to comply with or contrary to its development strategy. There are different ways to make an IIA asymmetrical and to reflect special needs of less developed Parties. For instance, less onerous obligations may be imposed on the developing Party, or a timetable for implementation with longer time frames may be introduced for the developing Party. An alternative is to reduce the normative intensity of IIA provisions for the less developed Party, such as by drafting best-endeavour commitments. Country-specific reservations are another means of accepting asymmetrical obligations for the less developed Party. Moreover, several SDT options can be combined in the same treaty. For example, the treaty can establish longer phase-in periods for pre-establishment obligations, country-specific carve-outs from the prohibition of performance requirements, best-endeavour obligations with respect to transparency, and account for the level of development in the FET provision.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
Asymmetrical obligations ... enable imposition of less onerous obligations on a less developed Contracting Party (continued)	**1.1.2 Reservations** Include country-specific reservations from general obligations, e.g. carving out sensitive sectors, policy areas or enterprises of specific size (e.g. SMEs). Could be used for, e.g.: • pre-establishment obligations • national treatment • MFN treatment • performance requirements • personnel and staffing (senior management). **1.1.3 Development-friendly interpretation** Promote interpretation of protection standards that takes into account States' different level of development. Could be used for, e.g.: • fair and equitable treatment • full protection and security • amount of compensation awarded.	
2 Additional tools ... encourage positive contributions by a more developed Contracting Party	**2.1.0 Technical assistance** Undertake a (best-endeavour) obligation to provide technical assistance to implement IIA obligations, to respond to ISDS cases and to facilitate FDI flows. **2.1.1 Investment promotion** Provide investment incentives to outward FDI such as investment guarantees.	SDT can also manifest itself in special obligations for the more developed Contracting Party. These are meant to operationalize the IIA, so that it performs its FDI-promoting function and, if necessary, so that it helps the less developed Party implement certain IIA obligations. SDT can also take the form of cooperation on training and assistance for adequate State representation in investor-State disputes, including through establishing an investment advisory centre, which can assist countries in reducing costs and increasing efficiency when dealing with ISDS claims. Including such provisions in the treaty, even in a non-binding manner, would provide a mandate to the more developed Party to put in place relevant technical-assistance and promotion activities.

V. PROMOTING INVESTMENT IN SDGs: ACTION MENU

A basic prerequisite for successful promotion of sustainable investment is a sound overall policy climate, conducive to attracting investment while safeguarding public interests, especially in sensitive sectors. The national and international investment policy guidance contained in the previous chapters therefore represents a necessary first step. This chapter outlines a menu of strategic initiatives for the promotion of investment in specific sectors that are key to countries' sustainable development prospects, including basic infrastructure (roads, rail and ports; power stations; water and sanitation), food security (agriculture and rural development), climate change mitigation and adaptation, health, and education (referred to commonly as SDG-related sectors, for ease of exposition). The initiatives outlined in this chapter are included in UNCTAD's Action Plan for Investment in the Sustainable Development Goals (SDGs), contained in WIR14.

A basic prerequisite for successful promotion of sustainable investment is a sound overall investment policy climate

A strategy for attracting and guiding private investment into priority areas for sustainable development requires the creation of an enabling policy environment. Key determinants for a host country's attractiveness, such as political, economic and social stability; clear, coherent and transparent rules on the entry and operational conditions for investment; and effective business facilitation are all relevant for encouraging investment in target sectors. The rule of law needs to be respected, together with a credible commitment to transparency, participation and sound institutions that are competent, efficient and immune to corruption.[39] At the same time, alleviating policy constraints for private investment in priority sectors must not come at the price of comprising legitimate public interests concerning the ownership structure and the regulatory framework for related activities. This calls for a gradual approach towards liberalization of SDG-related sectors and proper sequencing.

The enabling policy framework should clearly stipulate in what areas private investment is permitted and under what conditions. While many SDG-related sectors are open to private investment in numerous countries, important country-specific limitations persist. One case in point is infrastructure, where public monopolies are common. More privatization can open up new investment opportunities, but may require a gradual approach, starting from those sectors where private involvement faces fewer political concerns. Host countries may first allow service and management contracts and move to public-private partnerships once contractual partners have gained more experience.

Private investment may also be hindered by exclusive rights that governments grant to single service providers (e.g., in water or energy supply) to ensure sufficient revenue for the operator through economies of scale. Such policies should not entirely impede market access for small-scale providers, since the latter can be essential to fill the gap of service provision where the main operator fails to reach the poorest or isolated segments of the population.[40]

If concerns exist particularly in respect of *foreign* participation in SDG-related sectors, host countries can opt for foreign ownership limitations instead of complete prohibitions. They can also subject foreign investment to a national security test on a case-by-case basis, for instance as regards investment in critical infrastructure. Investment contracts between the host country and foreign investors, as well as business concessions offer the possibility to admit foreign investment under the condition that the investor actively contributes to sustainable development. For instance, foreign investors have received the right to exploit natural resources in exchange of a commitment to build certain infrastructure or social institutions, such as hospitals or schools.

With respect to foreign participation in agriculture, unambiguous land tenure rights, including a cadaster system, are critical not only for attracting investors, but also for protecting smallholders from dispossession and for increasing their bargaining power vis-à-vis foreign investors. Political opposition against foreign ownership of agricultural land can sometimes be alleviated by promoting contract farming as an alternative (*WIR09*).

Especially in infrastructure sectors, often natural monopolies, a crucial prerequisite for liberalization or opening up to private or foreign investors is the establishment of effective competition policies and authorities. Also in other sectors, such policies can help avoid a crowding out of local micro- and small and medium-sized firms (or agricultural smallholders) who form the backbone of the economy in most developing countries.

The previous chapters on national and international policies provides guidance on a host of other regulatory and policy areas that are relevant for the creation of a conducive investment climate and for safeguarding public policy interest. The Core Principles are a sound starting point for dealing with the inherent tensions that arise with increased reliance on private investment in certain SDG-related sectors that are particularly sensitive and of a public service nature.

The following paragraphs will build on the premise that sound regulatory framework for the attraction of private investors to SDG-related sectors is in place, and focus on concrete initiatives to promote investment.

1. ESTABLISHING A NEW GENERATION OF INVESTMENT PROMOTION STRATEGIES AND INSTITUTIONS

Alleviating constraints in the policy framework of host countries may not be sufficient to trigger private investment in target sectors. Potential investors may still hesitate to invest, because they consider the overall risk-return ratio as unfavourable. Investment promotion and facilitation efforts can help overcome these investor hesitations.

a. Evolving IPAs into investment development agencies

Through their investment promotion and facilitation policies, and especially in the priorities given to Investment Promotion Agencies (IPAs), host countries pursue a variety of mostly economic objectives, above all job creation, export promotion, technology transfer, linkages with local industry and domestic value added as well as skills development. Most IPAs, therefore, do not focus specifically on sustainable development investment objectives or sectors, although the existing strategic priorities do contribute to sustainable development through the generation of income and poverty alleviation.

A new generation of investment promotion requires agencies to target priority sectors for sustainable development and to define and market pipelines of bankable projects.

Pursuing investments in SDG-related sectors implies, inter alia, (i) targeting investors in sectors or activities that are particularly relevant, and (ii) creating and bringing to market a pipeline of pre-packaged bankable projects.

In pursuing relevant investment projects, IPAs face a number of challenges beyond those experienced in the promotion of conventional FDI. In particular:

- A broadening of the IPAs network of in-country *partnerships.* Currently, typical partners of IPAs include trade promotion organizations (TPOs), economic development agencies, export processing zones and industrial estates, business development organizations, research institutions, universities. While these relationships can help promote investment in relevant projects, the network needs to expand to include public sector institutions dealing with policies and services related to infrastructure, health, education, energy and rural development, as well as local governments, rural extension services, non-profit organizations, donors and other development stakeholders.
- Broadening of contacts with wider groups of *targets* and potential investors, including not only TNCs but also new potential sources of finance, such as sovereign wealth funds, pension funds, asset managers, non-profit organizations, and others.
- Development of *in-house expertise* on sustainable-development-related investment projects, new sectors and possible support measures. IPAs, which traditionally focus on attracting investments in manufacturing and commercial services, need to become familiar with the concept of sustainable-development-related investment projects, including

public-private partnerships (PPPs). Training in international best practice and investment promotion techniques could be acquired from international organizations and private sector groups. For example, in 2013, UNCTAD started a program that assists IPAs from developing countries in the promotion of green FDI.

To channel investment into target sectors that may be less visible or attractive to investors, governments – alone or in the context of regional cooperation – should develop a *pipeline of bankable SDG investment projects*.

Key characteristics of bankable projects are prioritization, preparation and packaging:

- *Political prioritization* involves the identification of priority projects and the determination of priority sectors, based on national development objectives and strategies. The projects should be politically feasible within the economic development strategy of the country, with a clear political consensus at all levels (national, state, provincial as applicable) and public support. Thus projects should be selected on the basis of a consensus among government entities on their priorities. At this inception stage, policy makers should identify scalable business models and develop strategies for large-scale roll-out over the long term.
- *Regulatory preparation* involves the pre-clearing of regulatory aspects and facilitation of administrative procedures that might otherwise deter investors. Examples include pre-approval of market-support mechanisms or targeted financial incentives (such fiscal incentives aiming to reduce the cost of capital); advance processing of required licenses and permits (e.g. planning permissions); or carrying out environmental impact studies prior to inviting bids from investors.
- *Packaging* relates to the preparation of concrete project proposals that show viability from the standpoint of all relevant stakeholders, e.g. technical feasibility studies for investors, financial feasibility assessments for banks, environmental impact studies for wider stakeholders. Governments can call upon service providers (e.g. technical auditors, test and certification organizations) to assist in packaging projects. Packaging may also include break up or aggregation/bundling of projects into suitable investment sizes for relevant target groups. And it will include the production of the "prospectus" that can be marketed to investors.

Public funding needs for feasibility studies and other project preparation costs can be significant. They typically average 5-10% of total project costs, which can add up to hundreds of millions of dollars for large infrastructure projects.[41] To accelerate and increase the supply of bankable projects at national and regional level, particularly in LDCs, international support programmes (e.g. technical assistance of MDBs) may be called on.

Key characteristics of bankable projects: prioritize, prepare, package

As part of their role to maximize the development impact of investment and to build linkages, Investment development agencies could build incubators or economic zones specifically aimed at stimulating businesses in SDG-related sectors. Initiatives to maximize absorptive capacity for sustainable-development investment could be made more (cost-) effective if they are conducted in one place through the creation of special economic zones (SEZs) or technology zones, or the conversion of existing ones into sustainability-focused clusters. These can be used to promote, attract, and retain investment in specific and inter-related SDG-related sectors with a positive impact arising from:

- *Cluster and networks* of closely associated firms and activities supporting the development of inclusive spillovers and linkages, within and without zones. As local firms' capabilities rise, demonstration effects also become increasingly important.
- *Incubator facilities and processes* designed into zones' sustainable development support services and infrastructure to nurture local business and social firms/entrepreneurs (and assist them in benefitting from the local cluster).
- Zones acting as mechanisms to *disseminate responsible investment,* including in terms of labour practices, environmental sustainability, health and safety, and good governance.

Setting up SEZs in support of the sustainable development goals requires a highly nuanced approach, extending beyond traditional approaches. For instance, an sustainability-focused zone could be rural-based, linked to specific agricultural products, and designed to support and nurture smallholder farmers, social entrepreneurs from the informal sector, ensure social inclusion of disadvantaged groups and incorporate wider goals.

In the context of sustainability-focused SEZs, policymakers should consider broadening the availability of sustainable development related policies, services and infrastructure to assist companies in meeting stakeholder demands, for instance improved CSR policies and practices. This would strengthen the state's ability to promote environmental best practices and meet its obligation to protect the rights of workers.

Re-orienting investment incentives towards sustainable development implies targeting investments in priority sectors and making incentives conditional on social and environmental performance.

b. Re-designing investment incentives

Designing investment incentives schemes for sustainable developnment implies putting emphasis on the quality of investments in terms of their mid-and long-term social and environmental effects (table 7). Essentially, incentives would move from purely *"location-based"* (a tool to increase the competitiveness of a location) to *"sustainable-development-based"* (a tool to promote investment in sustainable development).

Table 7. Traditional and sustainable-development-oriented investment incentives

Traditional economic growth oriented investment incentives	Investment incentives that take into account sustainable development considerations
• Focus on sectors important for economic growth, job creation and export generation	• Additional focus on relevant sectors and social and environmental aspects
• Focus on short- and medium term economic gains	• Long-term implications of investment for sustainable development considered
• Cost-benefit analysis in favour of economic gains	• Cost-benefit analysis with adequate weight to long-term social and environmental costs of investment
• Lowering of regulatory standards considered as a policy option	• Lowering of regulatory standards as part of the incentives package excluded
• Monitoring primarily on economic impacts of the investment	• Monitoring of the overall impact of the investment on sustainable development

Source: UNCTAD

Sustainable-development-oriented investment incentives can be of two types:

- Incentives targeted specifically at priority sectors (e.g. incentives provided for investment in renewable energy, infrastructure, health).
- Incentives conditional upon social and environmental performance of investors. Examples include performance requirements relating to employment, training, local sourcing of inputs, R&D, energy efficiency or the location in disadvantaged regions.

Table 8 contains some examples of investment incentives related to environmental sustainability.

In UNCTAD's most recent survey of IPAs, IPAs noted that, among priority sectors, investment incentives schemes are mostly provided for energy, R&D and infrastructure development projects. In addition to these sectors, incentives are provided for projects across numerous sustainability areas, or linked to sustainability objectives through performance criteria.

In addition to financial, fiscal or regulatory incentives, governments can facilitate investors by building surrounding enabling infrastructure or by letting investors use such infrastructure at low or zero cost. For instance, investments in agricultural production require good storage and transportation facilities. Investments in renewable energy (e.g. wind or

solar parks) necessitate the building of a grid to transport the energy to consumers. The construction of schools and hospitals in rural areas calls for adequate roads and public transportation to make these education and health services easily reachable. There is an important role for domestic, regional and multilateral development banks in realizing such enabling projects.

A reorientation of investment incentives policies (especially regulatory incentives) towards sustainable development could necessitate a phasing out of incentives that may have negative social or ecological side effects, in particular where such incentives result in a "race-to-the-bottom" with regard to social or environmental standards or in a financially unsustainable "race to the top".

Table 8. Examples of investment incentives linked to environmental sustainability

Country	Environmental incentives
Brazil	• initiatives and incentive programs for wind power, biomass, and small hydro sub sectors
Canada	• special tax credits for development of new technologies that address issues of climate change, clean air, and water and soil quality • Nova Scotia provides up to 20% of the cost of ocean tech and non-traditional energy source development
Germany	• grant programs for projects related to energy efficiency, CO_2 reduction, and renewable energy
Indonesia	• five- to ten-year tax break in renewable energy
Japan	• investments in smart communities that use information and communications technologies to optimize the use of renewable energy, water treatment, and recycling
Mexico	• projects in select cities must meet environmental guidelines to qualify for investment incentives
South Africa	• accelerated depreciation for investments in renewable energy and biofuel production • tax break for entities that become more energy efficient • allowance for expenditure on green technology and improved resource efficiency
Turkey	• interest-free loans for renewable energy production and energy efficiency improvement and environmental impact reduction projects
United Kingdom	• funding schemes for off-shore wind farms
United States	• guarantees loans to eligible clean energy projects and provides direct loans to manufacturers of advanced technology vehicles and components • tax incentives to improve energy efficiency in the industrial sector • Incentives at state level

Source: UNCTAD; see also *WIR14*.

A stronger focus on sustainable development may call for a review of existing subsidy programs for entire industries. For example, the World Bank estimates that $1 trillion to $1.2 trillion are currently being spent on environmentally harmful subsidies for fossil fuel, agriculture, water and fisheries.[42] More generally, investment incentives are costly. Opportunity costs must be carefully considered. Public financial outlays in case of financial incentives, or missed revenues in case of fiscal incentives, could be used directly for sustainable-development-oriented investment projects.

Investment incentives should also not become permanent; the supported project must have the potential to become self-sustainable over time – something that may be difficult to achieve in some sectors. This underlines the importance of monitoring the actual effects of investment incentives on sustainable development, including the possibility of their withdrawal if the impact proves unsatisfactory.

c. Building partnerships for investment in SDG-related sectors

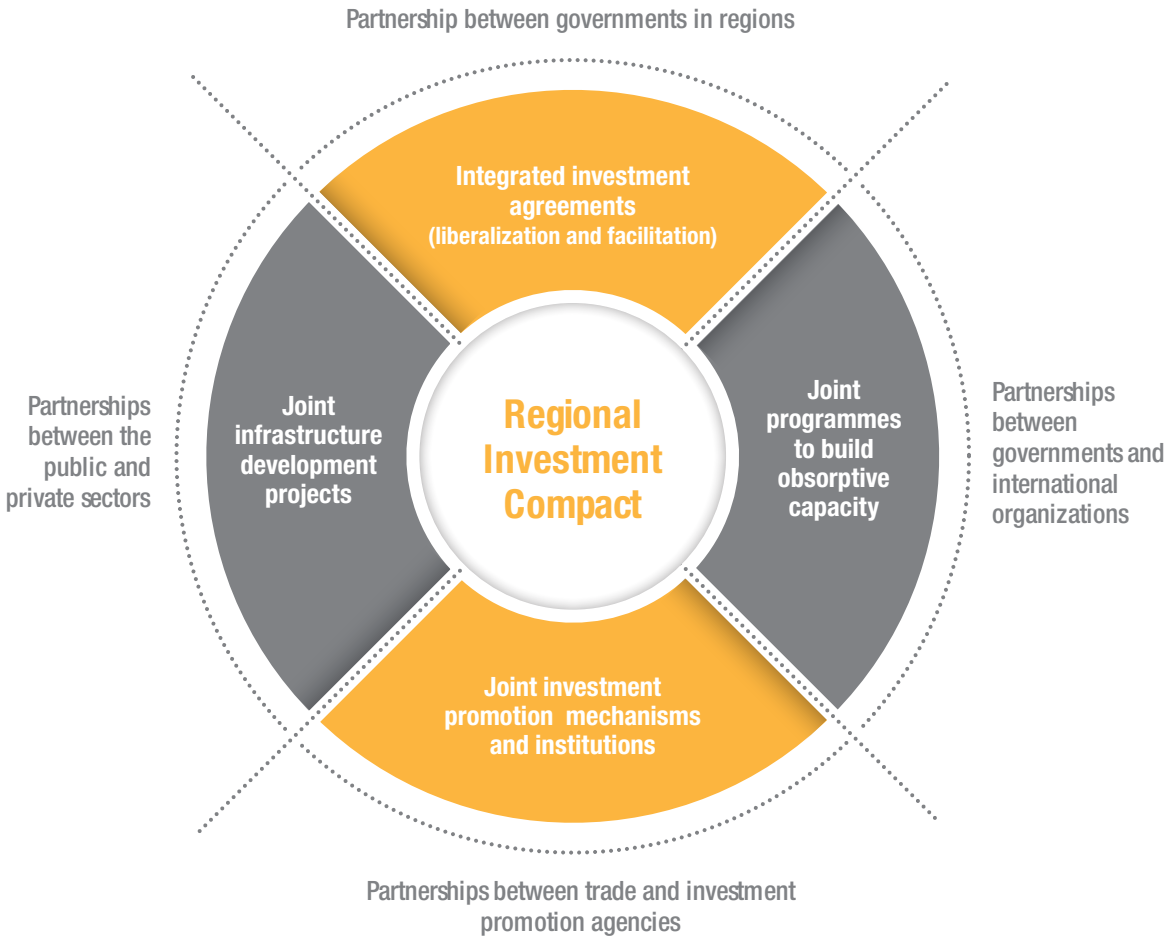
Regional Investment Compacts

Regional cooperation can foster sustainable investment. A key area for such cross-border cooperation is infrastructure development (e.g. roads, electricity grids, water supply).

Existing regional economic cooperation initiatives could evolve towards *"regional investment compacts."* Such compacts could focus on liberalization and facilitation of investment and establish joint investment promotion mechanisms and institutions. Regional industrial development compacts could include in their scope all policy areas important for enabling regional development, such as the harmonization, mutual recognition or approximation of regulatory standards and the consolidation of private standards on environmental, social and governance issues.

Regional investment compacts could aim to create cross-border clusters through the build-up of relevant infrastructure and absorptive capacity. Establishing such compacts implies working in partnership, between governments of the region to identify joint investment projects, between investment promotion agencies for joint promotion efforts, between governments and international organizations for technical assistance and capacity-building, and between the public and private sector for investment in infrastructure and absorptive capacity (figure 2) (see also *WIR13*).

Figure 2. Regional Investment Compacts



Source: UNCTAD, adapted from *WIR13*.

Partnerships between home and host country investment promotion agencies.

Cooperation between outward investment agencies (OIAs) in home countries and IPAs in host countries could be done systematically or could be institutionalized. IPAs that target sustainable-development-oriented projects could partner with OIAs for three broad purposes:

- Information dissemination and marketing of relevant investment opportunities in home countries. OIAs could provide matching services, helping IPAs identify potential investors to approach.
- Where OIAs provide investment incentives and facilitation services to their investors for sustainable-development projects, the partnership could increase chances of realizing the investment.
- OIA incentives for target investments could be conditional on the ESG performance of investors, ensuring continued involvement of both parties in the partnership for monitoring and impact assessment.

Through such partnerships OIAs could evolve into genuine business development agencies for investments in SDG-related sectors in developing countries, raising awareness of investment opportunities, helping investors bridge knowledge gaps and gain expertise, and practically facilitate the investment process.

2. EXPANDING THE USE OF RISK SHARING TOOLS FOR INVESTMENT IN SUSTAINABLE DEVELOPMENT

A key means to improve the risk-return profile for private sector actors is the ability of relevant stakeholders (the public sector, typically home country governments, development banks or international organisations) to share, minimize or offer alternatives to the risks associated with investment in sustainable development. Innovative risk management tools can help channel finance and corporate investment in sustainable development projects. Typical instruments vary depending on specific requirements of sustainable development projects across different areas.

A number of tools, including PPPs, investment insurance, blended financing and advance market commitments, can help improve the risk-return profile of investment projects.

a. Public-Private Partnerships

The use of PPPs can be critical to channeling investment in SDG-related sectors because they involve the public and private sectors working together, combining skills and (financial, managerial and technical) resources in innovative ways, and sharing risks. Many governments turn to PPPs when the scale and the level of resources required for the projects mean those cannot be undertaken solely through conventional public expenditures or procurement. PPPs are typically used for infrastructure projects, especially for water and transportation projects (such as roads, rail and subway networks), but also in social infrastructure, healthcare and education.[43] PPPs may also involve international sustainable development programmes and donor funds; for instance, the International Finance Facility for Immunization is a public-private partnership, which uses the long term borrowing capacity of donor governments, with support of the international capital markets to collect funds and finance the GAVI immunization programmes

PPPs can offer various means for improving the risk-return profile of sustainable development projects. They offer the possibility for tailor-made risk sharing in respect of individual sustainable development investments. PPPs also allow for cost sharing concerning the preparation of feasibility studies, risk sharing of the investment operations through co-investment, guarantees and insurances, an increase of investor returns through, for example, tax credits and industry support by providing capacity for

research and innovation. Direct financial support agreed upon in PPPs can help to overcome start-up barriers for sustainable development-related investments.

Caution is needed when developing PPPs as they can prove relatively expensive methods of financing and may increase the cost to the public sector if up-front investment costs and subsequent revenue streams (investment returns) are not adequately assessed. This is especially relevant for LDCs and SVEs with weaker technical, institutional and negotiation capacities.[44] Examples of risks associated with PPPs for governments include high fiscal commitments, or difficulty in the estimation of the cost of guarantees (e.g. when governments provide guarantees on demand, exchange rates or other costs). Governments should carefully design contractual arrangements, ensure a fair risk-sharing between the public and the private sector, develop the capacities to monitor and evaluate the partnership, and promote good governance in the PPP projects.[45]

Given the technical complexity of PPP projects and the institutional and governance capabilities required on the part of developing countries, widening the use of PPPs will require:

- the creation of dedicated units and expertise in public institutions, e.g. in investment development agencies or relevant investment authorities, or in the context of regional investment development compacts where costs and know-how can be shared.
- technical assistance from the international development community, e.g. through dedicated units in international organizations (or in a multi-agency context) advising on PPP project set-up and management.

An option that can alleviate risks associated with PPPs, further leverage public funds to increase private sector contributions, and bring in technical expertise, are three- or four-way PPP schemes with the involvement not only of local governments and private sector investors, but also with donor countries and multilateral development banks as partners.

b. Guarantee and risk insurance facilities

Numerous countries promote outward investment by providing investment guarantees that protect investors against certain political risks in host countries (such as the risk of discrimination, expropriation, transfer restrictions or breach of contract). Granting such guarantees can be conditional on the investment complying with sustainability criteria. A number of countries, such as Australia, Austria, Belgium, Japan, the Netherlands, the United Kingdom and the United States require environmental and social impact assessments to issue guarantees for projects with potentially significant adverse impacts.[46]

In addition to mechanisms providing insurance against political risks at the country level, mechanisms providing *guarantees and risk insurance* offered by multi-lateral development institutions also take into account sustainable development objectives. For instance, in determining whether to issue a guarantee, the Multilateral Investment Guarantee Agency evaluates all projects in accordance with its Policy on Environmental and Social Sustainability, adopted in October 2013. [47]

c. ODA-leveraging and blended financing

The 2002 Monterrey Consensus already pointed at the need to intensify efforts to promote the use of official development assistance (ODA) to leverage additional financing for development. ODA continues to be of critical importance, particularly for least developed countries, because financial flows to these countries are small and the capacity to raise sufficient resources domestically is lacking. Aid can act as a catalyst for private investment, and there is growing consensus on the potential complementarity of public aid and private investment to foster development.[48] To date, the share of ODA supporting private investment is small, but interest in this mechanism is rising among donor countries and development finance institutions; for example, blended ODA from EU institutions rose from 0.2 per cent in 2007 to almost 4 per cent in 2012.[49] The amount of ODA directed to private sector blending mechanisms is expected to increase.

ODA-leveraged and blended financing involves using ODA funds as base capital, to share risks or improve risk-return profile for private sector funders. Blending can reduce costs as it involves the complementary use of grants and non-grant sources such as loans or risk capital to finance investment projects in developing countries. It can be an effective tool for investment with long gestation periods and with economic and social rates of return exceeding the pure financial rate of return (e.g. in the renewable energy sector).

Caution must be exercised in the use of blending, as it involves risks. Where the private funding component exclusively pursues financial returns, development impact objectives may be blurred. ODA can also crowd out non-grant finance.[50] Evaluating blended projects is not easy and it can be difficult to demonstrate additionality, transparency and accountability – key success factors – and to provide evidence of development impact.

d. Advance market commitments and other market creation mechanisms

In several SDG-related sectors, private investment is severely constrained by the absence of a sufficient market. For instance, private basic health and education services, but also infrastructure services, such as private water and electricity supply, may not be affordable to large parts of the population. Examples of policy options to help create markets in target sectors that can attract private sector investment include:

- Policies aimed at enhancing *social inclusiveness and accessibility* of basic services – such as subsidy schemes for the poor in the form of education vouchers or cash grants for energy and water distribution.
- *Public procurement policies*, through which governments at the central and local level can give preference to the purchase of goods that have been produced in an environmentally and socially-friendly manner. Cities, for example, increasingly have programs relating to the purchase of hybrid fleets or renewable power, the upgrading of mass transportation systems, green city buildings or recycling systems (*WIR10*).
- *Feed-in tariffs* for green electricity produced by households or other private sector entities that are not utilities but that can supply excess energy to the grid (*WIR10*).
- *Regional cooperation* can help create markets, especially for cross-border infrastructure projects, such as roads, electricity or water supply, by overcoming market fragmentation.

Other concrete mechanisms may include so-called Advance Market Commitments (AMC). These are binding contracts typically offered by governments or financing entities which can be used (i) to guarantee a viable market, e.g. for goods that embody socially beneficial technologies for which private demand is inadequate such as pharmaceuticals and renewable energy technologies;[51] (ii) to provide assured funding for the innovation of socially beneficial technologies, e.g. through rewards, payments, patent buyouts, even if the private demand for the resulting goods is insufficient; and/or (iii) to act as a consumption subsidy when the R&D costs are high and the returns uncertain, with a result of lowering the price for consumers, often allowing the private sector to remain in charge of the production, marketing and distribution strategies. AMCs[52] have been used, for example, to raise finance for development of vaccine production for developing countries. Donors guarantee a viable market for a known period, which reduces the risks for producers associated with R&D spending (i.e. commitments act as incentives for producers to invest in research, staff training and production facilities). AMCs have proved successful in accelerating the availability of the pneumococcal vaccine in low-income countries.

3. CREATING FERTILE SOIL FOR INNOVATIVE FINANCING APPROACHES AND CORPORATE INITIATIVES

A range of innovative financing solutions to support sustainable development have emerged in recent years, including new financial instruments, investment funds and financing approaches. These have the potential to contribute significantly to sustainable development investment, but need to be encouraged, adapted to purpose and scaled-up as appropriate. It is important to note that many of these solutions are private-sector led, reflective of an increasing convergence between UN and international community priorities and those of the business community.

Innovative financial instruments and funding mechanisms to raise resources for investment in sustainable development deserve support to achieve scale.

a. Dedicated financial instruments and Impact Investment

Financial instruments which raise funds for investment in social or environmental programs are proliferating, and include Social Impact Bonds, Green Bonds and the proposed Development Impact Bonds. They target investors that are keen to integrate social and environmental concerns into their investment decisions. They are appealing because they ensure a safe return to investors (many are backed by donors or multilateral banks), but also because investors are not always able to clearly define and identify sustainable projects or products. The proceeds are credited to special accounts that support loan disbursements for sustainable-development investment projects (e.g. climate change adaptation and mitigation projects).

These instruments were often initially the domain of multilateral development banks because this lent credibility with investors in terms of classifying which investments were socially and environmentally friendly. More recently, however, a number of TNCs have issued Green bonds. For instance, EDF Energy undertook a EUR1.4 billion issue to finance investment in solar and wind energy; Toyota raised $1.75 billion for the development of hybrid vehicles; and Unilever raised GBP250 million for projects that would reduce GHG emissions, water usage or waste within its supply chain.[53] While the development of this market by corporate issuers is positive, its continued advance may give rise to the need for labeling or certification of investments, so investors have assurance about which are genuinely “green” or have “social impact”.

Impact investing is a phenomenon that reflects investor’s desire to generate societal value (social, environmental, cultural) as well as achieve financial return. Impact investment can be a valuable source of capital, especially to finance the needs of low-income developing countries or for products and services aimed at vulnerable communities. The types of projects targeted can include basic infrastructure development, social and health services provision and education. Impact investors include aid

agencies, NGOs, philanthropic foundations and wealthy individuals, as well as banks, institutional investors and other types of firms and funds. Impact investing is defined not by the type of investor, but by their motives and objectives.[54]

A number of financial vehicles have emerged to facilitate impact investing by such groups. Estimated impact investments through these funds presently range from $40 to $100 billion, depending on which sectors and types of activity are defined as constituting "impact investing"; and similarly the estimated future potential of impact investing varies from the relatively modest to up to $1 trillion in total. A joint UNCTAD-US State Department study on Impact Investment (see box 11) observed in 2012 that over 90 per cent of impact investment funds are still invested in the developed world, mostly in social impact and renewable energy projects. Among developing countries, the largest recipient of impact investing is Latin America and the Caribbean, followed by Africa and South Asia. A key objective should be to direct more impact investment to developing countries, and especially LDCs.

A number of constraints hold back the expansion of impact investing in developing countries. Key constraints related to the mobilization of impact investment funds include: lack of capital across the risk-return spectrum; lack of a common understanding of what impact investment entails; inadequate ways to measure "impact"; lack of research and data on products and performance; and a lack of investment professionals with the relevant skills. Key demand-related constraints in developing countries are: shortage of high quality investment opportunities with a track record; and a lack of innovative deal structures to accommodate portfolio investors' needs. A number of initiatives are underway to address these constraints and expand impact investment, including: the Global Impact Investing Network (GIIN), the US State Department Global Impact Economy Forum, Impact Reporting and Investment Standards, Global Impact Investment Ratings System, and the UK Impact Program for sub-Saharan Africa and South Asia.

b. Public funding mechanisms as catalysts for private sector investment

A range of initiatives exist to use the capacity of the public sector to mobilize private finance. Often these operate at the project level, but initiatives also exist at a macro-level to raise funds from the private sector, including through financial markets.

Vertical funds (or financial intermediary funds) are dedicated mechanisms which allow multiple stakeholders (government, civil society, individuals

and the private sector) to provide funding for pre-specified purposes, often to underfunded sectors such as disease eradication or climate change. Funds such as the Global Fund to Fight AIDS, Tuberculosis and Malaria[55] or the Global Environment Fund[56] have now reached a significant size. Similar funds could be created in alignment with other specific sustainable development focus-areas. The Africa Enterprise Challenge Fund[57] is another prominent example of a fund that has been used as a vehicle to provide preferential loans for the purpose of developing inclusive business.

Box 11. Promoting impact investment and maximizing its development benefits

Highlights of a joint UNCTAD-US State Department Study

As a contribution to the Global Impact Economy Forum, held in Washington in April 2012 and hosted by then US Secretary of State Hillary Clinton, UNCTAD and the State Department jointly produced a study on Impact Investment. The study concluded that Impact Investment can make a valuable contribution to inclusive and sustainable development objectives. The study also provided a number of policy directions:

Policies and engagement by policymakers could increase the available pool of Impact Investment capital (*mobilizing* funds). Such policies could include initiatives such as enabling intermediaries to offer Impact Investment vehicles; promoting more potential investors; creating networks of Impact Investors to share experiences and opportunities; facilitating a better understanding of risk versus perceived risk; and building confidence in the investment approach. Impact investing could also benefit from policymakers creating sector-specific incentives.

Policies to promote Impact Investment may also include reducing 'demand side' impediments (*channeling* funds and maximizing *impact*). This may occur through capacity building, the identification and preparation of pipelines of suitable and attractive investment projects, and public-private sector partnerships (PPP). Demand-side initiatives may involve host country government action, investor-country support, and participation by other actors in the international development community, including the private sector.

The study observed that policymakers should carefully consider the interaction between Impact Investment policies and other investment policies, and efforts to encourage the former should not detract from the promotion and facilitation of other forms of investment for development, notably foreign direct investment (FDI), which contributes to broad development goals, including economic growth, job creation, exports and enterprise development.

Finally, the study concluded that UNCTAD, together with other relevant international organizations can play a key role in promoting Impact Investment for development, through its program of technical assistance to developing countries on investment policy, and as a leading forum for discussion on international investment policy issues.

Source: UNCTAD.

Matching funds have been used to incentivize private sector contributions to development initiatives by making a commitment that the public sector will contribute an equal or proportionate amount. For example, under the GAVI Matching Fund, the UK Department for International Development and the Bill and Melinda Gates Foundation have pledged about US$ 130 million combined to match contributions from corporations, foundations, their customers, members, employees and business partners.[58]

Front-loading of aid. In addition to catalyzing additional contributions, the public sector work can induce private sector actors to use financing mechanisms that change the time profile of development financing, through front-loading of aid disbursements. The International Finance Facility for Immunization (IFFIm) issues AAA rated bonds in capital markets which are backed by long-term donor government pledges. As such, aid flows to developing countries which would normally occur over a period of twenty years are converted to cash immediately upon issuance. For investors, the bonds are attractive due to the credit rating, a market-comparable interest rate and the perceived "socially responsible return" on investment. IFFIm has raised more than US$ 4.5 billion to date through bond issuances purchased by institutional and retail investors in a range of different mature financial markets. [59]

Future-flow securitization. Front-loading of aid is a subset of a broader range of initiatives under the umbrella of future-flow securitization which allows developing countries to issue marketable financial instruments whose repayments are secured against a relatively stable revenue stream. These can be used to attract a broader class of investors that would otherwise be the case. Other prominent examples are diaspora bonds whose issuance is secured against migrant remittance flows, and bonds back by the revenue stream (royalties, export receivables) from natural resource or telecommunications industries. These instruments allow developing countries to access funding immediately that would normally be received over a protracted period.

c. New 'go-to-market' channels for SDG investment projects in financial markets.

A range of options is available, and can be expanded, to help bring concrete sustainable-development investment projects of sufficient scale to financial markets in mature economies, reducing dependence on donors and increasing the engagement of the private sector.

Project aggregation and securitization. Investment projects in SDG-related sectors are often not well aligned with the needs of institutional investors in mature financial markets because projects are too small and sectors fragmented. For example, renewable energy markets are more

disaggregated than traditional energy markets. Institutional investors prefer to invest in assets which have more scale and marketability than investment in individual projects provide. As such, aggregating individual projects in a pooled portfolio can create investment products more in line with the appetite of large investors. This can be achieved through securitization of loans to many individual projects to create tradable, rated asset backed securities. A group of insurers and reinsurers with US$3 trillion of assets under management have recently called for more scale and standardization of products in low carbon investments.[60]

Crowd funding. Crowd funding is an internet-based method to raising money, either through donations or investments, from a large number of individuals or organizations. Globally it is estimated that crowd funding platforms raised $2.7 billion in 2012 and were forecast to increase 81% increase in global in 2013, to $5.1 billion.[61] While currently more prevalent in developed countries, it has large potential to fund SDG-related projects in developing countries. Crowd-funding has been an effective means for entrepreneurs or businesses in developed countries that do not have access to more formal financial markets. In a similar way, crowd funding could help dormant entrepreneurial talent and activity to circumvent traditional capital markets and obtain finance. For example, since 2005 the crowd funding platform Kiva Microfunds has facilitated over $560million in internet-based loans to entrepreneurs and students in 70 countries. [62]

Box 12. Sustainable Stock Exchanges

Sustainable stock exchanges provide listed entities with the incentives and tools to improve transparency on environmental, social and governance (ESG) performance, and allow investors to make informed decisions on responsible allocation of capital.

Corporate sustainability reporting is a key means to maximize the positive impact of private sector investment. Sustainability reporting initiatives of financial markets and intermediaries are important because they help to align capital market signals with sustainable development and thereby to mobilise responsible investment. For example, given their direct and indirect influence over a large share of the global pool of available financial resources, financial intermediaries and asset managers should be required to disclose if and how they integrate ESG factors into their investment decisions, ratings and other services. Greater accountability and transparency of the investment allocation decisions and advice of asset managers, pension funds, insurance companies, investment consultants and investment banks, among others, is essential. Without proper measurement, verification and reporting of financial, social and environmental sustainability information, ultimate sources of capital (especially households and governments) cannot determine how the funds that have entrusted to these institutions have been deployed.

Stock exchanges and capital market regulators play a key role in this respect, because of their position at the intersection of investors, companies and government policy. The Sustainable Stock Exchanges (SSE) initiative is a peer-to-peer learning platform for exploring how exchanges can work together with investors, regulators, and companies to enhance corporate transparency, and ultimately performance, on ESG (environmental, social and corporate governance) issues and encourage responsible long-term approaches to investment.

Launched by the UN Secretary-General in 2009, the SSE is co-organized by UNCTAD, the UN Global Compact, the UN-supported Principles for Responsible Investment, and the UNEP Finance Initiative. The SSE initiative invites exchanges globally to become Partner Exchanges by making a voluntary commitment to advance sustainability in their market.

The SSE currently has twenty-three partner exchanges across five continents ranging from biggest exchanges in the world like NASDAX OMX, NYSE, London Stock Exchange and Deutsche Boerse, to major regional exchanges like the Bombay Stock Exchange, Borsa Istanbul, BM&FBOVESPA (Brazil), the Johannesburg Stock Exchange, and the Stock Exchange of Thailand. Collectively these twenty three exchanges list over 20,000 companies with a market capitalization of over USD 40 trillion.

An increasing number of stock exchanges and regulators have introduced, or are in the process of developing, initiatives to help companies meet the evolving information needs of investors; navigate increasingly complex disclosure requirements and expectations; manage sustainability performance; and understand and address social and environmental risks and opportunities. UNCTAD has provided a guidance to help policymakers and stock exchanges in this effort.

Source: UNCTAD.

VI. THE WAY FORWARD

1. THE EVOLVING INVESTMENT POLICY LANDSCAPE

A new generation of investment policies is emerging, pursuing a broader and more intricate development policy agenda within a framework that seeks to maintain a generally favourable investment climate. "New generation" investment policies recognize that investment is a primary driver of economic growth and development, and seek to give investment policy a more prominent place in development strategy. They recognize that investment must be responsible, as a prerequisite for inclusive and sustainable development. And in the design of "new generation" investment policies policymakers seek to address long-standing shortcomings of investment policy in a comprehensive manner in order to ensure policy effectiveness and build a stable investment climate.

This document has painted the contours of a new investment policy framework for sustainable development. The Core Principles set out the design criteria for investment policies. The national investment policy guidelines suggest how to ensure integration of investment policy with development strategy, how to ensure policy coherence and design investment policies in support of sustainable development, and how to improve policy effectiveness. The policy options for key elements of IIAs provide guidance to IIA negotiators for the drafting of sustainable-development-friendly agreements; they form a comprehensive overview of the myriad of options available to them in this respect. In addition, a menu of options has been included proposing strategic initiatives for the promotion of investment in projects and sectors that are key for countries' sustainable development prospects.

In developing the Investment Policy Framework (in its original conception and in its updated version), UNCTAD has had the benefit of a significant body of existing work and experience on the topic. UNCTAD itself has carried out more than 30 investment policy reviews (IPRs) in developing countries over the years (box 4), analyzed in detail investment regulations in numerous countries for the purpose of investment facilitation (box 6), and produced many publications on best practices in investment policy (box 7), including in the *WIR* series. Other agencies have a similar track record, notably the OECD and the World Bank, various regional organizations, and a number of NGOs. In defining an Investment Policy Framework, this document has attempted to harness the best of existing work on investment policies, investment policy frameworks, guidelines and models, and to build on experience in the field in their implementation.

The Investment Policy Framework is not a negotiated text or an undertaking between States. It is an initiative by the UNCTAD secretariat, representing expert guidance for policymakers by an international organization, leaving national policymakers free to "adapt and adopt" as appropriate.

UNCTAD's Investment Policy Framework serves as a reference in policy debates, a basis for technical assistance, and a point of convergence in international cooperation on investment.

The framework has shown it can serve as a key point of reference for policymakers in formulating national investment policies and in negotiating or reviewing IIAs. It can also serve as a reference for policymakers in areas as diverse as trade, competition, industrial policy, environmental policy, or any other field where investment plays an important role. The framework is used as the basis for capacity building on investment policy. And it can act as a point of convergence for international cooperation on investment issues.

The updated framework has gone through numerous consultations, comprehensively and by individual parts, with expert academics and practitioners. It will remain a "living document". UNCTAD will continue to provide a platform for further consultation and discussion with all investment stakeholders, including policymakers, the international development community, investors, business associations, labour unions, and relevant NGOs and interest groups. UNCTAD's biennial *World Investment Forum* is the premier global platform in this respect (see below).

2. A GLOBAL PUSH FOR INVESTMENT IN SUSTAINABLE DEVELOPMENT

a. Actions for the international community

Closing the SDG investment gap requires a concerted push by the international community.

In its *World Investment Report 2014*, UNCTAD discussed the financing needs associated with the post-2015 sustainable development agenda. *WIR14* presented an Action Plan for Investment in the Sustainable Development Goals (SDGs), arguing for a *concerted push* by the international community, and calling for global leadership to (i) provide clear direction and basic principles of action, (ii) set objectives and targets, (iii) build strong and lasting consensus among many stakeholders worldwide, and (iv) ensure that the process is inclusive, keeping on board countries that require support along the way. The Action plan outlined key initiatives to be taken up by the international community:

Agree a set of guiding principles for private sector investment in the SDGs

The many stakeholders involved in promoting private investment in SDGs will have as many different perspectives on how to resolve the policy dilemmas inherent in seeking greater private sector involvement in SDG sectors. A common set of principles for investment in SDGs can help establish a common sense of direction and purpose.

UNCTAD's Investment Policy Framework includes a set of principles specifically focused on investment policies that could inform wider debate

on guiding principles for investment in the SDGs. They are the design criteria for sound investment policies, at the national and international levels, that can support SDG investment promotion and facilitation objectives while safeguarding public interests.

Set SDG investment targets

The rationale behind the SDGs, and the experience with the MDGs, is that targets help provide direction and purpose. Ambitious investment targets are *implied* by the prospective SDGs. The international community would do well to make such targets explicit and to spell out the consequences for investment policies and investment promotion at national and international levels. *WIR14* has shown that, especially in LDCs, not taking action on investment promotion would lead to a private sector investment gap that would impose an unrealistic burden on public resources and ODA (requiring a ten-fold increase by 2030). Achievable but ambitious targets for increasing private sector engagement in investment in LDCs are thus a must.

Establish a global multi-stakeholder platform on investing in the SDGs

Meeting ambitious targets to increase private sector investment in the SDGs will require action at many levels by policymakers in developed and developing countries, internationally in international policymaking bodies and by the development community, and by the private sector itself. Such broad engagement needs coordination and strong consensus on a common direction. At present international discussions on private sector investment in sustainable development is dispersed among many organizations, institutions and forums, each addressing specific areas of interest. There is no global institution or body that provides a platform for discussion on overall goals and targets, shared mechanisms for mobilization of finance and channeling of investment into sustainable development projects, and broadly accepted and adopted ways and means of measuring and maximizing positive impact while minimizing any negative effects.

A **global multi-stakeholder body on investing in the SDGs** could fill that gap, for example, galvanizing promising initiatives to mobilize finance and spreading good practices, supporting actions on the ground channeling investment to priority areas, and ensuring a common approach to impact measurement. As a start, a multi-stakeholder expert committee on SDG investment could be convened, reporting to ECOSOC and to the General Assembly.

Create a multi-agency technical assistance facility

Finally, many of the actions required to promote investment in sustainable development are complex, requiring significant technical capabilities

and strong institutions. As financial resources raised will have to land on the ground in some of the poorest countries, often with relatively weak governance systems, technical assistance will be required in order to avoid leaving behind the most vulnerable countries where progress on the SDGs is most important. A **multi-agency institutional arrangement** could help to support LDCs, advising on, for example, investment guarantee and insurance schemes, the set-up of SDG project development agencies that can plan, package and promote pipelines of bankable projects, design of SDG-oriented incentive schemes, regulatory frameworks, etc.

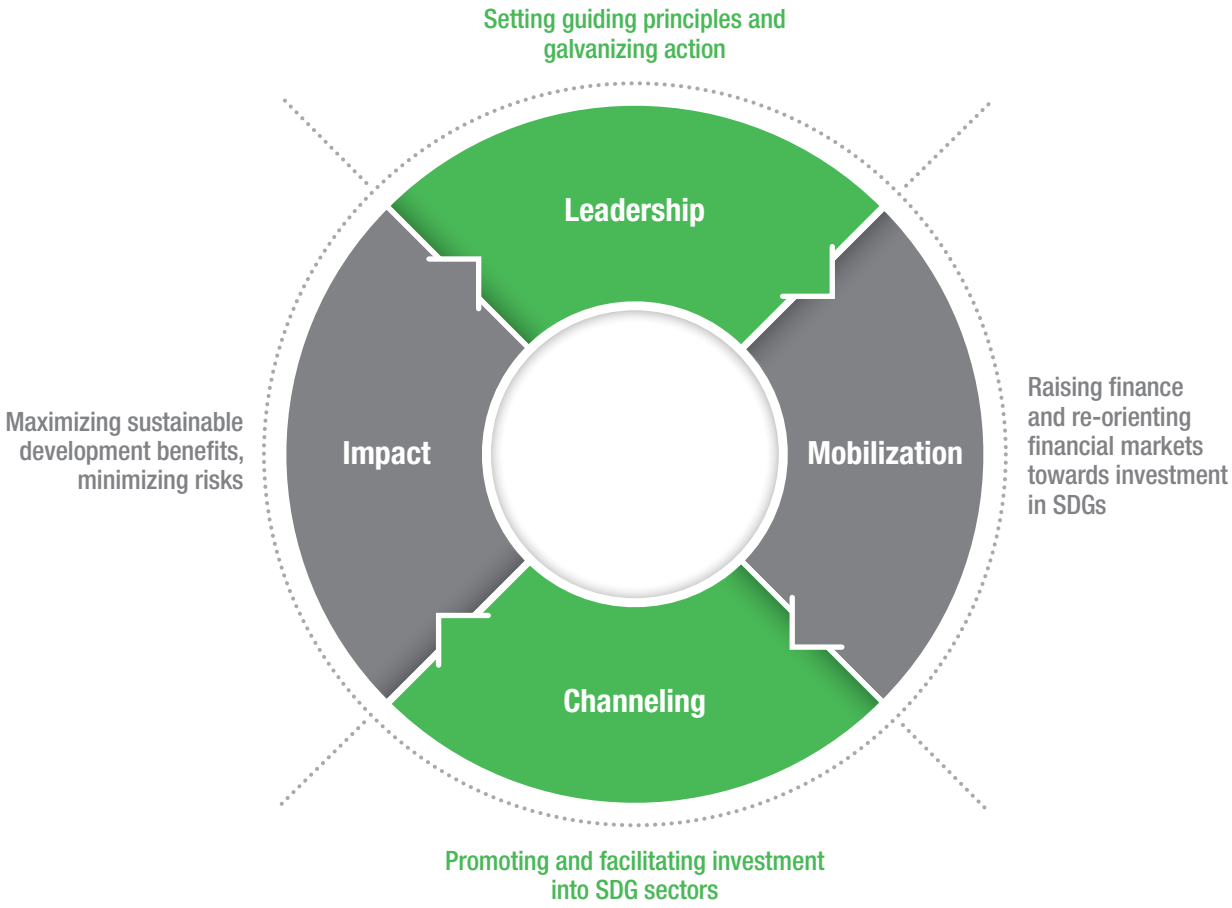
b. A strategic framework for action at the global level

The urgency of the problem of increasing the contribution of the private sector to SDG investment and the need for a *concerted push* by the international community requires a holistic strategic framework that provides guidance on *mobilizing* funds, *channelling* them to sustainable development, and maximizing *impact* (figure 3).

A concerted push for increased private investment in the SDGs means mobilizing and channeling funds, and maximizing positive impact.

While there is a myriad of policy ideas and options available to policymakers, a focused set of priority packages can help shape a big push for private investment in sustainable development. As stated above, there are many solutions, mechanisms and policy initiatives that can work in raising private sector investment in sustainable development. A concerted push by the international community, and by policymakers at national levels, needs to focus on few priority actions – or packages. Figure 4 contains six priority packages that address specific segments of the "SDG investment chain" (and one overarching package), and that address relatively homogenous groups of stakeholders for action.

Figure 3. Strategic framework for corporate investment in the SDGs



Source: UNCTAD.

Figure 4. A big push for action: policy packages

Action Packages

1 New generation of investment promotion and facilitation

- At national level:
  - ✓ New investment promotion strategies
  - ✓ New investment promotion institutions: SDG investment development agencies
- New generation of IIAs:
  - ✓ Pro-active SDG investment promotion
  - ✓ Safeguarding policy space

2 Reorientation of investment incentives

- SDG-oriented investment incentives:
  - ✓ Targeting SDG sectors
  - ✓ Conditional on sustainability performance
- SDG investment guarantees and insurance schemes

3 Regional SDG Investment Compacts

- Regional cross-border SDG infrastructure
- Regional SDG industrial clusters, including for regional value chains
- Regional industrial collaboration agreements

4 New forms of partnerships for SDG investment

- Home-host country IPA networks
- Online pools of bankable projects
- SDG-oriented linkages programmes
- MDB-TNC-SVE partnerships

5 Enabling a re-orientation of financial markets

- SDG investment impact indicators and INDEX
- Integrated reporting and multi-stakeholder monitoring
- Sustainable Stock Exchanges (SSEs)

6 Changing the global business mindset

- Global Impact MBAs
- Training programmes for SDG investment (e.g. fund management/ financial market certifications)
- Enrepreneurship programmes in schools

Guiding Principles

- Balancing liberalization and regulation
- Balancing the need for attractive risk-return rates with the need for accessible and affordable services
- Balancing the push for private funds with the continued fundamental role of public investment
- Balancing the global scope of the SDGs with the need to make a special effort in LDCs

Source: UNCTAD.

1

A new generation of investment promotion and facilitation. Sustainable development projects, whether in infrastructure, social housing or renewable energy, require intensified efforts for investment promotion and facilitation. Such projects should become a priority of the work of investment promotion agencies and business development organizations, taking into account their peculiarities compared to other sectors. For example, some categories of investors in such projects may be less experienced in business operations in challenging host economies and require more intensive business development support.

The most frequent constraint faced by potential investors in sustainable development projects is the lack of concrete proposals of sizeable, impactful, and bankable projects. Promotion and facilitation of investment in sustainable development should include the marketing of pre-packaged and structured projects with priority consideration and sponsorship at the highest political level. This requires specialist expertise and dedicated units, e.g. government sponsored 'brokers' of sustainable development investment projects.

Putting in place such specialist expertise (ranging from project and structured finance expertise to engineering and project design skills) can be supported by technical assistance from international organizations and multilateral development banks. Units could also be set up at the regional level (see also the regional compacts) to share costs and achieve economies of scale.

At the *international investment policy level*, promotion and facilitation objectives should be supported by investment agreements that pursue the same objectives. Current agreements focus on the protection of investment. Mainstreaming sustainable development in IIAs requires pro-active promotion of investment, with commitments in areas such as technical assistance, linking investment promotion institutions, facilitating SDG investments through investment insurance and guarantees, and regular impact monitoring.

2

SDG-oriented investment incentives. Investment incentive schemes can be restructured specifically to facilitate sustainable development projects, e.g. as part of risk-sharing solutions. In addition, investment incentives in general – independent of the economic sector for which they are granted – can incorporate sustainable development considerations by encouraging corporate behavior in line with SDGs. A transformation is needed to move incentives from purely *"location-based"* (aiming to increase the competitiveness of a location) towards *"SDG-based"*, aiming to promote investment for sustainable development.

Regional economic cooperation organizations, with national investment authorities in their region could adopt common incentive design criteria with the objective to re-orient investment incentive schemes towards sustainable development.

3

Regional SDG Investment Compacts. Regional cooperation can foster SDG investment. A key area for such SDG-related cross-border cooperation is infrastructure development. Existing regional economic cooperation initiatives could evolve towards "regional SDG investment compacts." Such compacts could focus on liberalization and facilitation of investment and establish joint investment promotion mechanisms and institutions. Regional industrial development compacts could include in their scope all policy areas important for enabling regional development, such as the harmonization, mutual recognition or approximation of regulatory standards and the consolidation of private standards on environmental, social and governance issues.

4

New forms of partnership for SDG investments. Cooperation between outward investment agencies (OIAs) in home countries and IPAs in host countries could be institutionalized for the purpose of marketing SDG investment opportunities in home countries; OIA provision of investment incentives and facilitation services for SDG projects; and joint monitoring and impact assessment. OIAs could evolve into genuine business development agencies for investments in SDG sectors in developing countries, raising awareness of investment opportunities, helping investors bridge knowledge gaps and gain expertise, and practically facilitate the investment process. Concrete tools that might support SDG investment business development services might include on-line tools with pipelines of bankable projects, an opportunities for linkages programmes in developing countries.

5

Enabling a re-orientation of financial markets. Integrated reporting on the economic, social and environmental impact of private investors is a first step towards encouraging responsible behavior by investors on the ground. It is a condition for other initiatives aimed at channeling investment into SDG projects and maximizing impact; for example, where investment incentives are conditional upon criteria of social inclusiveness or environmental performance, such criteria need clear and objective measurement. In addition, it is an enabler for responsible investment behavior in financial markets and a prerequisite for initiatives aimed at mobilizing funds for investment in SDGs; integrated reporting is at the heart of Sustainable Stock Exchanges.

6

Changing the global business mindset and develop SDG investment expertise. The majority of managers in the world's financial institutions and large multinational enterprises – the main sources of global investment – as well as most successful entrepreneurs tend to be strongly influenced by models of business, management and investment that are commonly taught in business schools. Such models tend to focus on business and investment opportunities in mature or emerging markets, with the risk-return profiles associated with those markets, while they tend to ignore opportunities outside the parameters of these models. Conventional models also tend to be driven exclusively by calculations of economic risks and returns, often ignoring broader social and environmental impacts,

both positive and negative. Moreover, a lack of consideration in standard business school teachings of the challenges associated with operating in poor countries, and the resulting need for innovative problem solving, tend to leave managers ill-prepared for pro-poor investments. These factors contribute to a paradoxical situation where even the majority of students interested in social entrepreneurship end up starting projects in middle- to high-income countries, and most impact investments – investments with objectives that explicitly include social or environmental returns – are located in mature markets. A curriculum for business schools that generates awareness of investment opportunities in poor countries and that instills in students the problem solving skills needed in developing-country operating environments will have an important long-term impact.

UNCTAD, in partnership with business school networks, teachers, students as well as corporates, is currently running an initiative to develop an "impact curriculum" for MBAs and management schools, and a platform for knowledge sharing, exchange of teaching materials and pooling of "pro-poor" internship opportunities in LDCs. UNCTAD invites all stakeholders who can contribute to join the partnership. See *business-schools-for-impact.org/.*

c. The World Investment Forum: Investing in Sustainable Development

Established in 2008, the UNCTAD World Investment Forum is a high-level, biennial, multi-stakeholder gathering designed to facilitate dialogue and action on the world's key and emerging investment-related challenges. It strives to fill a gap in the global economic governance architecture by establishing a global platform for engaging policymakers, the private sector, and other stakeholders at the highest level on investment issues and is recognized by governments and business leaders as the most important event for the international investment community.

The WIF has significant outcomes and impact:

- **The Forum shapes the future agenda for policymaking in investment for development.** For instance the Chairman's summary of the 2014 World Investment Forum was formally sent to the United Nations General Assembly to feed into the Conference on Financing for Development, the Sustainable Development Goals Summit, and the future COP21 in Paris.
- **The Forum serves as a launchpad for major international initiatives to address current and emerging challenges in the area of investment for development.** For instance, the 2014 Forum served as a platform to mobilize the private sector and channel its contribution to the implementation of the SDGs, including by launching new initiatives such as the New partnership on investing in sustainable cities.

- **The Forum provides crucial answers on how investors in developed and developing countries can face emerging challenges and opportunities.** For instance, the 2010 Forum was the occasion to launch a programme on "Green Foreign Direct Investment".
- **The Forum provides unique opportunities for global investors and policy-makers to hold official bilateral meetings, network informally and exchange ideas which lead to new initiatives, partnerships and concrete investment projects.** Over 50 bilateral meetings were formally organized in margin of the 2014 Forum.
- **The Forum provides a unique international platform to showcase countries' investment opportunities to the investors' community and conclude major deals with global TNCs.** For instance, the 2012 World Investment Forum was the occasion for Qatar to consolidate its links with the International Chamber of Commerce and prepare the ICC annual Conference in Doha, for Comoros and Nestlé to conclude a partnership for the production of Vanilla, and for Nestlé and Mc Kinsey to re-open operations in Tunisia.
- **The Forum generates considerable media attention, including in the Business and Financial press.** For instance the WIF2014 generated over 270 articles in global media.

The World Investment Forum brings together stakeholders from all angles of the investment-development community, including Heads of State and ministers, CEOs of global transnational corporations, market regulators, stock exchange executives, investment promotion agencies, investment treaty negotiators, investment lawyers, private and institutional investors, corporate executives, sovereign wealth fund managers, private equity funds managers, social entrepreneurs, mayors from mega cities and prominent parliamentarians, academics in the area of international business, economics and law, and international media.

Number/Year	2010 (Xiamen)	2012 (Doha)	2014 (Geneva)
Registered participants	1800	1400	3000
Heads of States , Government and Speakers of the House	9	8	7
Ministers	43	42	43
CEOs and global business executives	60	30	59
Represented countries	120	145	170

The increasing attendance to the Forum reflects its relevance for a broader coalition of investment stakeholders eager to contribute to responsible investment and sustainable development. It illustrates the Forum's pre-eminence on the global investment calendar and confirms the need for a global platform on investment-development issues.

For more information, please visit http://unctad-worldinvestmentforum.org/. The site includes information on and footage of previous World Investment Forums, as well as copies of previous World Investment Forum reports.

NOTES

[1] Many successful developing countries maintained a significant level of government influence over the direction of economic growth and development throughout; see UNCTAD (2011). Development-led globalization: Towards sustainable and inclusive development paths, Report of the Secretary-General of UNCTAD to UNCTAD XIII.

[2] The G-20, in its 2010 Seoul declaration, asked international organizations (specifically, UNCTAD, WTO and OECD) to monitor the phenomenon of investment protectionism.

[3] See Sauvant, K.P. (2009). "FDI Protectionism Is on the Rise," *World Bank Policy Research Working Paper 5052.*

[4] For example, the World Bank's Guidelines on the Treatment of Foreign Direct Investment, the OECD's Policy Framework for Investment (PFI), and instruments developed by various regional organizations and NGOs.

[5] These include, inter alia, the UN Global Compact, the UN Guiding Principles on Business and Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work, the IFC's Sustainability Framework and the OECD Guidelines for Multinational Enterprises.

[6] See ILO Global Employment Trends 2012, available on www.ilo.org.

[7] See, for example, UNCTAD (2011). "Promoting investment for development: Best practices in strengthening investment in basic infrastructure in developing countries," note by the UNCTAD secretariat to the Investment, Enterprise and Development Commission, TD/B/C.II/14, www.unctad.org.

[8] United Nations (2013). Report of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda.

[9] India, for example, requires the largest 100 listed companies on its major stock exchanges to report on environmental and social impacts.

[10] For example, the Johannesburg Stock Exchange in South Africa. Many other exchanges, such as BM&FBovespa in Brazil, have actively promoted voluntary mechanisms such as reporting standards and indices to incentivize corporate sustainability reporting.

[11] Producer of the most widely used sustainability reporting guidelines. According to a 2013 KPMG study, 93% of the world's largest 250 companies issue a CR report, of which 82% refer to the GRI Guidelines. Three-quarters of the largest 100 companies in 41 countries produce CR reports, with 78% of these referring to the GRI Guidelines; KPMG, Survey of Corporate Responsibility Reporting 2013.

[12] A global system for companies and cities to measure, disclose, manage and share environmental information and host to the Climate Disclosure Standards Board. Over 4,000 companies world-wide use the CDP reporting system.

[13] Producer of the International Integrated Reporting Framework, recognises sustainability as a contributor to value creation.

[14] Works to catalyze action by the finance, accounting and investor community to support a fundamental shift towards resilient business models and a sustainable economy.

[15] Provides standards for use by publicly-listed corporations in the United States in disclosing material sustainability issues for the benefit of investors and the public.

[16] The Sustainable Stock Exchanges (SSE) initiative is a joint initiative coordinated by UNCTAD, the UN Global Compact, UNEP Finance Initiative and the UN-supported Principles for Responsible Investment. For more information, please visit www.SSEinitiative.org.

[17] Based on Doran, G.T. (1981). "There's a S.M.A.R.T. way to write management's goals and objectives," *Management Review*, 70 (11), pp. 35-36.

[18] The universe of "core IIAs" principally consists of

BITs and other agreements that contain provisions on investment, so-called "other IIAs". Examples of the latter include free trade agreements (FTAs) or economic partnership agreements (EPAs). As regards their substantive obligations, "other IIAs", usually fall into one of three categories: IIAs including obligations commonly found in BITs; agreements with limited investment-related provisions; and IIAs focusing on investment cooperation and/or providing for future negotiating mandate on investment. In addition to "core IIAs", there are numerous other legal instruments that matter for foreign investment, including double taxation treaties (DTTs).

[19] Examples include the interaction between IIAs and other bodies of international law or policy in the field of public health (e.g. the World Health Organization Framework Convention on Tobacco Control, WHO FCTC), environment (e.g. the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes) or human rights (e.g. International Covenant on Economic, Social and Cultural Rights), to name a few. In the context of ensuring coherence between investment protection and climate change, WIR10 suggested a "multilateral declaration" clarifying that IIAs do not constrain climate change measures enacted in good faith.

[20] In some countries the existence of an IIA is a prerequisite for the granting of investment guarantees.

[21] This impact is generally stronger in the case of preferential trade and investment agreements (PTIAs) than with regards to BITs. See UNCTAD (2009). "The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries," *UNCTAD Series on International Investment Policies for Development*. New York and Geneva: United Nations. See also UNCTAD (2014). "The Impact of International Investment Agreements on Foreign Direct Investment: An Overview of Empirical Studies 1998-2014", *IIA Issues Note - working draft*. http://investmentpolicyhub.unctad.org/. For a full discussion of FDI determinants, see WIR98.

[22] See also Poulsen, L.N.S. and E. Aisbett (2011). "When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning." Crawford School Research Paper No. 5.

[23] UNCTAD (2015). "Recent trends in IIAs and ISDS", *IIA Issues Note*, No. 1, p. 5.

[24] As discussed in WIR04, interaction can be either autonomous-liberalization-led or IIA-driven, or anywhere in-between.

[25] This is in line with the traditional view of international law, as governing relations between its subjects, primarily between States. Accordingly, it is impossible for an international treaty to impose obligations on private actors (investors), which are not parties to the treaty (even though they are under the jurisdiction of the respective contracting parties).

[26] Article 13 "Investor Obligation" provides: "COMESA investors and their investments shall comply with all applicable domestic measures of the Member State in which their investment is made."

[27] UN Human Rights Council Resolution A/HRC/RES/26/9, "Elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with respect to Human Rights", adopted on 26 June 2014 (dated 14 July 2014).

[28] In fact, in the course of the past century, international law has been moving away from the traditional, strict view towards including, where appropriate, non-State actors into its sphere. See, e.g., Bianchi, A. (2009). *Non-State Actors and International Law*. Dartmouth: Ashgate.

[29] Also the 2012 Revision of the International Chamber of Commerce (ICC) Guidelines for International Investment refer to investors' obligations to comply with the laws and regulations of the host State at all times and, in particular, to their obligation to comply with national and international labour laws, even where these are not effectively enforced by the host State.

[30] The two numbers refer to the aggregate amounts of compensation claimed and obtained by the three claimants constituting the majority shareholders of former Yukos Oil Company in the ISDS proceedings against the Russian Federation. See Hulley Enterprises Limited (Cyprus) v. The Russian Federation, UNCITRAL, PCA Case No. AA 226, Award, 18 July 2014; Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. AA 227, Award, 18 July 2014; Veteran Petroleum Limited (Cyprus) v. The Russian Federation, UNCITRAL, PCA Case No. AA 228, Award, 18 July 2014.

[31] Nottage, H. (2003). "Trade and Competition in the WTO: Pondering the Applicability of Special and Differential Treatment", *Journal of International Economic Law*, 6 (1), p. 28.

[32] Based on six categories as identified in WTO (2000) "Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions," Note by Secretariat, WT/COMTD/W/77, 25 October 2000, available at www.wto.org. More recently, also the Doha Ministerial Declaration (2001) reaffirmed SDT as an integral part of the multilateral trade regime.

[33] COMESA Investment Agreement (2007), Article 14(3).

[34] For details, see UNCTAD (2011). "Sovereign Debt Restructuring and International Investment Agreements," *IIA Issues Note*, No. 2. www.unctad.org. Abaclat and others v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011.

[35] Any comprehensive effort to reform the ISDS regime would also have to go beyond IIA clauses, and address other rules, including those for conducting international arbitrations (e.g. ICSID or UNCITRAL).

[36] Experience with ISDS has revealed numerous instances of unclear or ambiguous clauses that risk being interpreted in an unanticipated and broad manner. Therefore the table includes options to clarify. However, these clarifications should not be used by arbitrators to interpret earlier clauses that lack clarifications in broad and open-ended manner.

[37] Absence of ISDS – and hence of the possibility to be subject to financial liabilities arising from ISDS – may make it easier for countries to agree to certain standards of protection.

[38] Similarly, one can combine far-reaching liberalization or protection clauses with a possibility to lodge reservations (e.g. for pre- and post-establishment clauses, and for existing and future measures). See UNCTAD (2006). "Preserving Flexibility in IIAs: The Use of Reservations", *UNCTAD Series on International Investment Policies for Development*. New York and Geneva: United Nations.

[39] Sachs, J.D. (2012). "From Millenium Development Goals to Sustainable Development Goals", *Lancet*, 379: 2206–2211 (p. 2209).

[40] OECD (2009). *Private Sector Participation in Infrastructure*. Paris: OECD.

[41] World Bank (2013). *Financing for Development Post-2015.* Washington, D.C.: World Bank, p. 32.

[42] World Bank (2012). *Inclusive Green Growth: The Pathway to Sustainable Development.* Washington, D.C.: World Bank, p. 4.

[43] Examples and case studies can be found in UNDP 2008. Sharing innovative experiences: Examples of successful public-private partnerships; World Bank (2009). *The role and impact of Public-Private partnerships in education*. Washington, D.C.: World Bank; IFC (2011). *IFC support to Health Public-Private Partnerships.* Washington, D.C.: World Bank; UNECE (2012). Discussion paper: A preliminary reflection on the best practice in PPP in Healthcare sector.

[44] Griffiths, J., M. Martin, J. Pereira, T. Strawson (2014). *"Financing for development post-2015: Improving the contribution of private finance"*. Study requested by the European Parliament's Committee on Development. Brussels: European Union, p. 32.

[45] There exist a number of useful guides, for instance World Bank (2009). *Public-private partnerships:*

Reference Guide. Washington, D.C.: World Bank; UNECE (2008). *Guidebook on promoting good governance in PPPs*. New York and Geneva: United Nations.

[46] Export Finance and Insurance Corporation (2014). "Environmental and social responsibility". http://stpf.efic.gov.au; Oesterreichische Kontrollbank (2012). "Austrian Environmental and Social Assessment Procedure". http://www.oekb.at; Delcredere/Ducroire (2014). "Delcredere/Ducroire's Environmental and Social Policy". http://www.delcredereducroire.be; Nippon Export and Investment Insurance (2009). "Guidelines on Environmental and Social Considerations in Trade Insurance". http://nexi.go.jp; Atradius Dutch State Business (2014). "Environmental- and social aspects". http://www.atradiusdutchstatebusiness.nl; UK Export Finance (2014). "Guidance to Applicants: Processes and Factors in UK Export Finance Consideration of Applications". https://www.gov.uk; Overseas Private Investment Corporation (2010). "OPIC – Environmental and Social Policy Statement". http://www.opic.gov/sites/default/files/consolidated_esps.pdf.

[47] Multilateral Investment Guarantee Agency (2014). "Environmental and Social Sustainability". http://www.miga.org.

[48] UN ECOSOC (2013). *Public aid as a driver for private investment*.

[49] Eurodad (2014). *A dangerous blend? The EU's agenda to 'blend' public development finance with private finance*. Brussels: Eurodad.

[50] Griffiths, J., M. Martin, J. Pereira, T. Strawson (2014). *"Financing for development post-2015: Improving the contribution of private finance"*. Study requested by the European Parliament's Committee on Development. Brussels: European Union, p. 35.

[51] UN DESA (2012). *World Economic and Social Survey 2012: In Search of New Development Finance.* New York: United Nations, p. 60.

[52] United Nations (2009). *Innovative Financing for development: the I–8 group.* New York: United Nations.

[53] See WIR14.

[54] Some typologies differentiate between social and impact investment, with the former stressing the generation of societal value, and the latter profit, but the distinction is not clear (a mix of impact and profit prevails in both types); many organisations and institutions use the terms interchangeably.

[55] The Global Fund to fight AIDS, Tuberculosis, and Malaria has secured pledges of about US$30 billion since its creation in 2002, and over 60% of pledges have been paid to date World Bank (2013). *Financing for Development Post-2015.* Washington, D.C.: World Bank, p. 19.

[56] The Global Environment Fund GEF - a partnership between 182 countries, international agencies, civil society, and private sector - has provided US$11.5 billion in grants since its creation in 1991 and leveraged US$57 billion in co-financing for over 3,215 projects in over 165 countries (the World Bank, 2013: 19).

[57] www.aecfafrica.org

[58] http://www.gavialliance.org/funding/give-to-gavi/gavi-matching-fund/

[59] http://www.iffim.org/bonds/

[60] http://www.climatewise.org.uk/storage/climatewise-docs/Fixed_Income_Statement.pdf

[61] http://research.crowdsourcing.Org/2013cf-crowdfunding-industry-report

[62] www.kiva.org

NOTE

The Division on Investment and Enterprise of UNCTAD is a global centre of excellence dealing with issues related to investment and enterprise development in the United Nations System. It builds on three-and-a-half decades of experience and international expertise in research and policy analysis, fosters intergovernmental consensus-building, and provides technical assistance to developing countries.

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Developed countries: the member countries of the OECD (other than Chile, Mexico, the Republic of Korea and Turkey), plus the new European Union member countries which are not OECD members (Bulgaria, Cyprus, Latvia, Lithuania, Malta and Romania), plus Andorra, Bermuda, Liechtenstein, Monaco and San Marino.

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- Two dots (..) indicate that data are not available or are not separately reported. Rows in tables have been omitted in those cases where no data are available for any of the elements in the row.
- A dash (–) indicates that the item is equal to zero or its value is negligible.
- A blank in a table indicates that the item is not applicable, unless otherwise indicated.
- A slash (/) between dates representing years, e.g., 1994/95, indicates a financial year.
- Use of a dash (–) between dates representing years, e.g. 1994–1995, signifies the full period involved, including the beginning and end years.
- Reference to “dollars” ($) means United States dollars, unless otherwise indicated.
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2015

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